Supreme Court, U.S.
FILED
JUL 26 2006
OFFICE OF THE CLERK

No. 06-140

In The

Supreme Court of the United States

SAMARJEET SIDHU,

Petitioner,

v.

ALBERTO GONZALES,
United States Attorney General,

Respondent.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Fifth Circuit

PETITION FOR WRIT OF CERTIORARI

BRIAN K. BATES
Counsel of Record for Petitioner
QUAN, BURDETTE & PEREZ, P.C.
5177 Richmond Ave., Suite 800
Houston, Texas 77056
(713) 625-9225

COCKLE LAW BRIEF PRINTING CO. (800) 225-6964
OR CALL COLLECT (402) 342-2831

QUESTION PRESENTED FOR REVIEW

1. Whether the grant of a waiver of inadmissibility to the Petitioner, a lawful permanent resident alien, under former §212(c) of the Immigration and Nationality Act was properly reversed upon the conclusion that, as a matter of law, the Petitioner was not eligible for the relief under this Court's decision in *INS v. St. Cyr*, 533 U.S. 289 (2001) solely because his conviction was not pursuant to a plea agreement.

PARTIES TO THE PROCEEDING

All parties to the proceeding are named in the caption of the case as recited on the cover page. There are no nongovernmental corporate parties requiring a disclosure statement under Supreme Court Rule 29.6.

TABLE OF CONTENTS

	Page
Question Presented for Review	i
Parties to the Proceeding	ii
Table of Contents	iii
Table of Authorities	iv
Citation to Opinions and Orders Below	1
Statement of Jurisdiction	2
Applicable Law	2
Statement of the Case	3
A. Jurisdiction of the Court of Appeals	3
B. Facts	4
1. Personal Particulars	4
2. Petitioner's Criminal Conviction	5
C. Procedural History	7
1. First Administrative Appeal	8
2. Hearing on Remand	9
3. Second Administrative Appeal	10
4. Judicial Review	11
Argument for Allowing the Writ	13
A. The Issue is Clearly Presented	13
B. Split of Authority – Guilty Plea Required	14
C. Split of Authority – No Guilty Plea Required	15
D. Other Cases – Actual Reliance Not Required	16
E. The Need for Clarification	18
Conclusion	22

TABLE OF AUTHORITIES

Page

CASES

UNITED STATES SUPREME COURT

Bowen v. Georgetown University Hospital, et al., 488 U.S. 204 (1988) 20

Hughes Aircraft Company v. United States ex rel Schumer, 520 U.S. 939 (1997) 21

INS v. St. Cyr, 533 U.S. 289 (2001) ..... *passim*

Landgraf v. USI Film Products, et al., 511 U.S. 244 (1994) 12, 14, 18, 20, 21

UNITED STATES COURTS OF APPEALS

Armendariz-Montoya v. Sonchik, 291 F.3d 1116 (9th Cir. 2002) 14, 15, 21

Chambers v. Reno, 307 F.3d 284 (4th Cir. 2002)... 14, 17, 18

Dias v. INS, 311 F.3d 456 (1st Cir. 2002) 14

Hernandez-Castillo v. Moore, et al., 436 F.3d 516 (5th Cir. 2006) 12, 14

LaGuerre v. Reno, 164 F.3d 1035 (7th Cir. 1998) 15

Olatunji v. Ashcroft, 387 F.3d 383 (4th Cir. 2004) 17, 18

Ponnapula v. Ashcroft, 373 F.3d 480 (3rd Cir. 2004) 12, 15, 16, 18, 20

Rankine v. Reno, 319 F.3d 93 (2d Cir. 2003) 14, 15, 17

Restrepo v. McElroy, 369 F.3d 627 (2d Cir. 2004) 17

USA v. Sidhu, 130 F.3d 644 (5th Cir. 1997) 4

TABLE OF AUTHORITIES – Continued

Page

STATUTES

8 U.S.C. §1101(a)(43)(M)(i) 2

8 U.S.C. §1182(c) (1995) 1, 2, 3

8 U.S.C. §1227(a)(2)(A)(iii) 2, 7

8 U.S.C. §1252(a)(1) 3

8 U.S.C. §1252(a)(2)(C) 2

8 U.S.C. §1252(a)(2)(D) 2

8 U.S.C. §1252(a)(2)(B) 2

18 U.S.C. §371 11

18 U.S.C. §1001 6

18 U.S.C. §1341 11

28 U.S.C. §1254(1) 2

IIRIRA §304(b) ..... *passim*

CITATIONS TO THE OPINIONS AND ORDERS BELOW

The decision of the United States Court of Appeals for the Fifth Circuit dismissing Petitioner's petition for review is unreported. *Sidhu v. Gonzales,* No. 04-60210 (5th Cir. April 27, 2006). App. 1.

The decision of the Board of Immigration Appeals reversing the grant of relief to Petitioner under former §212(c) of the Immigration and Nationality Act ("INA") 8 U.S.C. §1182(c) is unreported. *Matter of SIDHU,* File A38 007 490 (BIA February 26, 2004). App. 6.

The decision of the Immigration Judge, granting Petitioner relief under former INA §212(c) following remand from the Board of Immigration Appeals is unreported. *Matter of SIDHU,* File A38 007 490 (United States Immigration Court, El Paso, Texas, April 18, 2002). App. 9.

The decision of the Board of Immigration Appeals affirming the Immigration Judge's finding of deportability under INA §237(a)(2)(A)(iii) for an aggravated felony under INA §101(a)(43)(M)(i), and remanding the case to allow Petitioner the opportunity to apply for relief under former INA §212(c) and this Court's decision in *INS v. St. Cyr,* 533 U.S. 289 (2001) is unreported. *Matter of SIDHU,* File A38 007 490 (BIA October 19, 2001). App. 21.

The initial decision on the Immigration Judge finding Petitioner deportable and ineligible for any relief from removal is unreported. *Matter of SIDHU,* File A38 007 490 (United States Immigration Court, El Paso, Texas, April 18, 2001). App. 28.

STATEMENT OF JURISDICTION

The United States Court of Appeals for the Fifth Circuit denied Petitioner's petition for review on April 27, 2006. Jurisdiction in this Court is therefore proper by writ of certiorari pursuant to 28 U.S.C. §1254(1). While Petitioner's case involves a charge of deportability for conviction of an aggravated felony and an application for relief from removal, review is not barred by 8 U.S.C. §§1252(a)(2)(B) or (C) because the questions presented herein are "questions of law raised upon a petition for review." 8 U.S.C. §1252(a)(2)(D).

APPLICABLE LAW

INA §237(a)(2)(A)(iii), 8 U.S.C. §1227(a)(2)(A)(iii), which provides: "Any alien (including an alien crewman) in and admitted to the United States shall, upon the order of the Attorney General, be removed if the alien is within one or more of the following classes of deportable aliens: . . . (A) General crimes . . . (iii) Aggravated felony. Any alien who is convicted of an aggravated felony at any time after admission is deportable."

INA §101(a)(43)(M)(i), 8 U.S.C. §1101(a)(43)(M)(i), which provides: "The term 'aggravated felony' means – an offense that – (i) involves fraud or deceit in which the loss to the victim or victims exceeds $ 10,000."

Former INA §212(c), 8 U.S.C. §1182(c) (repealed), which provided: "Aliens lawfully admitted for permanent residence who temporarily proceeded abroad voluntarily and not under an order of deportation, and who are returning to a lawful unrelinquished domicile of seven

consecutive years, may be admitted in the discretion of the Attorney General without regard to the provisions of subsection (a) (other than paragraphs (3) and (9)(C)). Nothing in this subsection shall limit the authority of the Attorney General to exercise the discretion vested in him under section 211(b). The first sentence of this subsection shall not apply to an alien who has been convicted of one or more aggravated felonies and has served for such felony or felonies a term of imprisonment of at least 5 years."

STATEMENT OF THE CASE

Petitioner, a lawful permanent resident alien of long residence, seeks review of a decision by the United States Court of Appeals for the Fifth Circuit denying his petition for review of a final order of removal. In denying the petition for review, the Court of Appeals affirmed the finding of the Board of Immigration Appeals that Petitioner is deportable for having been convicted of an "aggravated felony," and further affirmed the conclusion of the Board that Petitioner was ineligible for a waiver of inadmissibility pursuant to former INA §212(c), 8 U.S.C. §1182(c) and this Court's decision in *INS v. St. Cyr,* 533 U.S. 289 (2001).

A. Jurisdiction of the Court of Appeals

The Court of Appeals had jurisdiction over Petitioner's petition for review pursuant to INA §242(a)(1), 8 U.S.C. §1252(a)(1), which provides for judicial review of a final order of removal.

B. Facts

The facts of this case are established through the testimony and documentation of record, and are undisputed. Mr. Samarjeet SIDHU is a native of India and a citizen of Canada who came to the United States as a lawful permanent resident ("LPR") in January 1984. He has one criminal conviction that made him the subject of removal proceedings.

1. Personal Particulars

Mr. SIDHU has been married to his wife, Milagros Isolina Sidhu, since May 1985. They have three children: a son, Samir, born in April 1989, and twin daughters Kiran and Natalia born in June 1990. Until his incarceration, Petitioner was always gainfully employed and the primary support for his family. His wife, Milagros, worked as a registered nurse until the birth of their son, Samir, in 1989.

Samir was diagnosed with severe cerebral palsy and epilepsy approximately two weeks after his birth in 1989. The needs of this child were the primary concern of the Immigration Judge in her decision granting relief, as they have been the primary concern of Petitioner's family for the past 17 years. Samir is "very dependent" 24 hours a day. He cannot speak, but communicates some by pointing, or pulling his lips when he's hungry. Samir is not ambulatory, but can only move anywhere by wheel chair. He cannot even sit up without assistance.

Samir is not "potty trained." Every morning, his diaper and bed clothes must be changed. He cannot feed, dress or bathe himself. He is 17 years old now and weighs

over 100 pounds. He must be lifted from his bed, into and out of his wheelchair and the bath tub. The physical and emotional demands of this routine are exhausting, but Mr. and Mrs. SIDHU cannot even sleep through the night because they must check on Samir several times to make sure he is not having a seizure.

Samir attends special education classes in the El Paso Independent School District. A Comprehensive Individual Assessment of his condition and progress, prepared by an Educational Diagnostician and a Speech Pathologist, is in the Record. This Assessment notes that Samir, at the time of the evaluation, could recognize four letters of the alphabet but could not read or write any words nor recognize any numbers. It also notes that his levels of expressive and receptive proficiency were "severely below average." Behavioral problems – short attention span, obsessive behavior, loud screaming, grabbing and scratching – were noted.

While their oldest son obviously has special and compelling needs, the SIDHU's twin daughters, Kiran and Natalia, are now 16 years old, normal and active. They attend a private school, with the assistance of an academic scholarship. Both are always on the schoolmaster's list with excellent grades and many academic achievements.

2. Petitioner's Criminal Conviction.

In May 1996, Petitioner was found guilty of four counts of a multi-count indictment also involving two co-defendants. He was convicted of one count of conspiracy to commit mail fraud, two counts of aiding and abetting mail fraud, and one count of providing false information to investigating government agents.

These charges resulted from a fraudulent scheme run by the principle co-defendant, Dr. Loren Gifford, who operated a medical clinic specializing in pain treatment. Mr. SIDHU worked as a biofeedback technician in Gifford's clinic for a time. The scheme involved mis-coding billing forms with the result that the government and insurance firms were billed for medical services that were either misrepresented or not performed at all. The overall scheme was alleged in the indictment to have resulted in "approximately $1.2 million in fraudulent billings in 1993 and 1994."

Petitioner was deemed to have played a "minor role in the offense" and accordingly was given a downward departure in his sentence. In setting forth the facts underlying the Government's conspiracy charge, the indictment sets forth in five paragraphs under Count 1 the "overt acts" taken in furtherance of the conspiracy. Only one of those paragraphs names Mr. SIDHU. In that paragraph, the "overt acts" attributed to Petitioner concerned several fraudulent billings that took place during a one week period (December 27, 1993 to January 3, 1994) while Dr. Gifford was out of the country. Those fraudulent billings involving Mr. SIDHU were alleged in amounts totaling $4,118.55.

The two "aiding and abetting" counts (Counts 5 and 6 in the indictment) concern two specific health insurance claim forms. Count 5 relates to a fraudulent claim that Dr. Gifford "conducted three 60 minute psychotherapy sessions" and "two 25 minute office visits." No dollar amount is alleged. Count 6 alleged a fraudulent claim concerning three 25 minute office visits with Dr. Gifford, but again no dollar amount is mentioned. The sole remaining count for which Petitioner was convicted involved a charge under 18

U.S.C. §1001 for falsely denying the significance of his involvement when questioned by government agents.

Petitioner went to trial on these charges, and was tried along with Dr. Gifford. He was found guilty as noted above in May 1996, with the judgment and sentence entered on September 24, 1996. An appeal was taken, and the Fifth Circuit Court of Appeals affirmed Petitioner's conviction and sentence on December 3, 1997. *USA v. Sidhu,* 130 F.3d 644 (5th Cir. 1997). While the court's opinion discussed the amount of "loss" attributable to Mr. SIDHU for sentencing purposes, no dollar figure was given.

C. Procedural History

Following Petitioner's conviction and incarceration, removal proceedings were commenced by service of a charging document, known as a "Notice to Appear" or "NTA," in April 1999. It alleged Petitioner's admission as a lawful permanent resident in 1984, and his conviction in 1996. It charged that he is deportable from the United States pursuant to INA §237(a)(2)(A)(iii), 8 U.S.C. §1227(a)(2)(A)(iii), for having been convicted of an aggravated felony "as defined in Section 101(a)(43) of the Act." This charge was later amended to specify that the conviction was an aggravated felony "as defined in Section 101(a)(43)(M) of the Act."

The INS offered no documentation concerning the "loss" produced by Petitioner's criminal conduct, other than the Second Superseding Indictment upon which his prosecution had been based. INS counsel argued that the Second Superseding Indictment itself was sufficient, and

pointed specifically to a single sentence in the text describing the overall conspiracy that alleged total fraudulent billings of "approximately $1.2 million."

Despite the lack of any additional documentation concerning Petitioner's conviction and the amount of "loss," the Immigration Judge sustained the aggravated felony charges on the basis of the judgment and indictment. She issued a written decision finding the charges of deportability to be sustained by the evidence, specifically referring to the above-noted language in the indictment concerning the overall conspiracy. App. 32. She further found Mr. SIDHU ineligible for any form of relief from removal, and ordered him removed to Canada. App. 40.

1. First Administrative Appeal

An appeal was taken to the BIA, and Petitioner submitted a brief in support of that appeal arguing again that the only evidence of record was insufficient to prove the required element of a "loss" in excess of $10,000. Before the BIA could decide Petitioner's appeal, this Court decided the case of *INS v. St. Cyr,* 533 U.S. 289 (2001). In that decision, the Court held, *inter alia,* that Congress did not intend the repeal of former INA §212(c) – a waiver of inadmissibility for which Petitioner would have been eligible under former law – to operate retroactively to convictions pre-dating that change in the law. Accordingly, Petitioner submitted a supplemental brief to the BIA, discussing *INS v. St. Cyr* and urging that his case should be remanded for consideration of a waiver of inadmissibility under former §212(c).

On October 19, 2001, a three member panel of the BIA issued a decision in Petitioner's case. The panel majority

dismissed Petitioner's arguments concerning the aggravated felony, and affirmed the Immigration Judge's finding of deportability. The majority noted that Petitioner had been found guilty of the overall mail fraud conspiracy, again quoted the allegation concerning the scheme having resulted in "approximately $1.2 million in fraudulent billings in 1993 and 1994," and adopted the findings of the Immigration Judge that such evidence proved a loss exceeding $10,000 by clear and convincing evidence. App. 24. The panel majority agreed, however, that the ultimate reach of the Supreme Court decision in *St. Cyr* was as yet undetermined, and agreed that Petitioner's case should be remanded for consideration of his request for relief under former §212(c). App. 25.

One BIA member dissented from the majority's holding on the aggravated felony issue. She argued that the element of a loss in excess of $10,000 was not proven by the evidence of record, and the removal proceedings should therefore be terminated for essentially the same reasons urged by Petitioner. App. 26-27.

2. Hearing on Remand

On remand to the Immigration Judge, it was stipulated that Petitioner was a lawful permanent resident, that he had the required years of lawful domicile to qualify for relief under §212(c). It was also stipulated that Petitioner was sentenced to and served less than five years as a result of his conviction, and that he had no other criminal record. The INS attorney also agreed that Petitioner's conviction would not have been an aggravated felony prior to the enactment of the Illegal Immigration Reform and Immigrant Responsibility Act of 1996 ("IIRIRA"), which

lowered the threshold "loss" amount from $200,000 to $10,000. INS argued, however, that Petitioner was ineligible for the requested relief under §212(c) because he was convicted after trial, rather than by guilty plea as was the case in *INS v. St. Cyr.*

After an evidentiary hearing in which the above-recited facts were established, the Immigration Judge granted relief in a written decision. App. 9. In that decision, she found Petitioner statutorily eligible for the waiver under INA §212(c) and the Supreme Court decision in *INS v. St. Cyr.* App. 12. She then addressed the various negative and positive factors weighing upon the exercise of discretion. While noting his involvement in a "significant criminal conspiracy" involving fraud, the Immigration Judge proceeded to identify numerous distinct equities, particularly the special needs of Samir and the heavy effects of those demands upon the family, and granted the requested relief. App. 17-20. The INS reserved appeal, and the case returned to the BIA.

3. Second Administrative Appeal

The INS position on appeal was that the decision in *INS v. St. Cyr* only applies to cases where the pre-IIRIRA conviction was entered as the result of a guilty plea. Absent the specific reliance upon existing law inherent in such a plea agreement, INS argued, "*INS v. St. Cyr* is inapplicable." On February 26, 2004, a single member of the BIA sustained the INS appeal. The Board refused to reconsider its finding on the aggravated felony determination. On the issue of eligibility for §212(c) relief, the Board simply noted that "*St. Cyr* is inapplicable to aliens who were convicted by jury trial." App. 7. Petitioner filed a timely

petition for review with the United States Court of Appeals for the Fifth Circuit.

4. Judicial Review

Before the Court of Appeals, Petitioner again argued that there was insufficient evidence of a loss that exceeds $10,000 resulting from his conviction. It was noted that the only evidence relied upon to establish this element of deportability was the single line in the indictment alleging "approximately $1.2 million in fraudulent billings in 1993 and 1994." The relevant criminal charge to which this paragraph referred was a conspiracy to commit mail fraud, a violation of 18 U.S.C. §§1341 and 371. A prosecution for mail fraud, however, does not by its elements require the United States to prove a monetary loss. 18 U.S.C. §1341. Petitioner argued that the allegation of "approximately $1.2 million in fraudulent billings" was therefore merely an estimate, impressive but ultimately immaterial since the Government was under no obligation to prove any such amount in the criminal trial. The record contains no documentation – not one item – that supports the estimate in the indictment. Even accepting the estimated total of "fraudulent billings," there is no evidence in the record to show how much of a "loss" actually resulted from the billings.

In the alternative, Petitioner argued that he was eligible for the waiver of inadmissibility under former INA §212(c) despite his conviction by trial. There has been no question that Mr. SIDHU qualified for relief under §212(c) at the time of his criminal conviction. On September 24, 1996, he was an LPR who had over 12 years lawful domicile; his offense was clearly not considered an aggravated

felony before IIRIRA reduced the threshold loss amount to $10,000, and even if it were considered an aggravated felony, he was sentenced to less than five years. As noted, the INS attorney stipulated to Petitioner's pre-IIRIRA eligibility, the Immigration Judge noted it, and the BIA said nothing to the contrary.

The question remaining was whether the subsequent repeal by IIRIRA §304(b) operates retroactively to foreclose relief. The Attorney General argued that *INS v. St. Cyr* only operated to protect those aliens who relied upon existing law in pleading guilty to the offense. Petitioner countered that this Court's decision in *St. Cyr* did not expressly require a plea of guilty, and that neither *St. Cyr* nor *Landgraf v. USI Film Products, et al.*, 511 U.S. 244 (1994) expressly requires proof of actual reliance upon existing law to find retroactive effect. In any event, Petitioner urged that he could well have relied upon the existence of §212(c) in electing *not* to enter into a plea bargain even if a demonstration of actual reliance were required. In support of his position concerning §212(c) relief, Petitioner relied in part upon a decision by the United States Court of Appeals for the Third Circuit. *Ponnapula v. Ashcroft*, 373 F.3d 480 (3rd Cir. 2004).

Petitioner's case was argued before the Court of Appeals in March 2006. The Fifth Circuit Court of Appeals ruled that Petitioner's conviction was an "aggravated felony" for "essentially the reasons stated by the BIA." App. 5. Concerning the issue of Petitioner's eligibility for §212(c) relief, the matter was decided against Petitioner by intervening Fifth Circuit precedent. Some weeks prior to the oral argument, the Court of Appeals had published its decision in *Hernandez-Castillo v. Moore, et al.*, 436 F.3d 516 (5th Cir. 2006), holding that, in the absence of a plea

agreement, "IIRIRA's repeal of §212(c) to Hernandez-Castillo does not create an impermissible retroactive effect." Consideration of Petitioner's alternative argument regarding the waiver of inadmissibility was therefore foreclosed by the earlier precedent. App. 5. The petition for review was denied, affirming the order of removal.

ARGUMENT FOR ALLOWING THE WRIT

There are essentially two reasons the Court should grant the instant Petition. First, the legal question presented herein is clearly presented on compelling facts. Second, there is a split of authority in the Courts of Appeals on precisely that legal question. Petitioner believes that the ruling of the Board of Immigration Appeals and the Fifth Circuit Court of Appeals is based upon an incorrect reading of pertinent Supreme Court precedents, and that intervention by this Court is therefore necessary to insure that the law is applied correctly and uniformly.

A. The Issue is Clearly Presented

Unlike many similar cases, Mr. SIDHU's application for relief under former §212(c) was not pretermitted by the agency below. He was allowed to present his claim through extensive documentation and witness testimony. Because of his long residence and the compelling needs of his United States citizen wife and children, particularly his cruelly disabled son Samir, the Immigration Judge granted relief. App. 9. Therefore, the discretion of the Attorney General has already been found warranted in the case of Mr. SIDHU.

Further, it is clear that neither the BIA nor the Court of Appeals considered the possibility that anything other than a guilty plea by agreement could establish retroactive effect in this case. The decision reversing the grant of relief is based solely upon an assertion that Petitioner was legally ineligible for the grant because of the BIA's conclusion, and the Court of Appeals concurrence, that "*St. Cyr* is inapplicable to aliens who were convicted by jury trial." App. 7. The Board and Court of Appeals have therefore reduced the question of retroactive effect in this case to "a simple or mechanical task." *See, Landgraf v. USI Film Products, et al., supra,* at 268. The repeal of §212(c) has a retroactive effect *only* if the alien pleaded guilty, and there can be no retroactive effect if the pre-IIRIRA conviction resulted from a trial. This mechanical formulation, however, has produced disagreement between the Circuit Courts of Appeals.

B. Split of Authority – Guilty Plea Required

In support of its holding that Mr. SIDHU was ineligible for a §212(c) waiver because he did not plead guilty, the BIA cited to decisions from the Second, Fourth and Ninth Circuits. *Rankine v. Reno,* 319 F.3d 93 (2d Cir. 2003); *Chambers v. Reno,* 307 F.3d 284 (4th Cir. 2002); *Armendariz-Montoya v. Sonchik,* 291 F.3d 1116 (9th Cir. 2002). App. 2. The First Circuit has also held that a guilty plea is required. *Dias v. INS,* 311 F.3d 456 (1st Cir. 2002). As noted, the Fifth Circuit joined the First, Second, Fourth and Ninth Circuits with *Hernandez-Castillo v. Moore,* 436 F.3d 516 (5th Cir. 2006).

The essence of these decisions is that an alien who chooses to go to trial cannot prove reliance upon the

continued existence of §212(c) relief, and therefore cannot prove that its repeal operates retroactively against him. Since there was no decision to waive the right to trial, these courts have looked in vain for other "conduct" that evidences reliance upon existing law. Several courts have observed, for example, that

> It would border on the absurd to argue that these aliens might have decided not to commit drug crimes, or might have resisted conviction more vigorously, had they known that if they were not only imprisoned but also, when their prison term ended, ordered deported, they could not ask for a discretionary waiver of deportation.

Armendariz-Montoya v. Sonchik, supra, at 1121, quoting *LaGuerre v. Reno,* 164 F.3d 1035, 1041 (7th Cir. 1998). This same passage has also been quoted in *Rankine v. Reno, supra,* at 101. In the absence of a clearly identifiable act or decision proving reliance, these courts have found that the repeal of §212(c) has no retroactive effect upon aliens who chose to go to trial.

C. Split of Authority – No Guilty Plea Required

The Third Circuit, on the other hand, has squarely held that a plea agreement is not required for the repeal of §212(c) to operate retroactively. Rather, the court noted, "*St. Cyr* is simply one application of the general principles articulated in *Landgraf* that counsel against interpreting statutes to have retroactive effect." *Ponnapula v. Ashcroft,* 373 F.3d 480, 483 (3rd Cir. 2004).

The Third Circuit disagreed with the other Circuits essentially for three reasons. First, the conflicting precedents from other courts gave inadequate consideration to

the *presumption* against retroactive effect, while "the presumption against retroactivity is the essence of the *Landgraf* line of cases." *Ponnapula v. Ashcroft, supra,* at 489. Second, the cases requiring a plea agreement seem to "require actual reliance by the party seeking to avoid retroactive application, yet the Supreme Court has never required actual reliance in any case in the *Landgraf* line." *Id.* Finally, the Third Circuit found missing from the Supreme Court precedents any requirement that "the party seeking to avoid retroactive application bears an evidentiary burden" to prove that their conduct was influenced by the existing law. *Id.,* at 490.

The Third Circuit further noted that, by under-emphasizing the presumption against statutory retroactivity and over-stressing reliance, the presumption was effectively reversed.

> Our disagreement with the courts that have held that IIRIRA's repeal of §212(c) relief is not impermissibly retroactive with respect to aliens who went to trial is that those courts have erected too high a barrier to triggering the presumption against retroactivity. This has the effect of treating *Landgraf* as establishing a presumption *in favor* of retroactive application. . . .

Id., at 491. For reasons set forth below, Petitioner believes the Third Circuit has correctly analyzed the issue of retroactivity in a case similar to his.

D. Other Cases – Actual Reliance Not Required

It is not simply a matter of a split between the Third Circuit on the one hand, with the First, Second, Fourth, Fifth and Ninth Circuits holding directly contrary in clear

terms on the same issue. Subsequent decisions from the Second and Fourth Circuits have made clear that "reliance" is not always required before retroactive effect may be found, and that there may be other forms of reliance than a plea agreement.

In *Restrepo v. McElroy,* 369 F.3d 627 (2d Cir. 2004), the Second Circuit held that an alien convicted by jury trial of conspiracy to distribute cocaine in 1992 may still seek relief under INA §212(c). The court held that the alien *may have relied* upon the continued existence of §212(c) relief in not applying affirmatively for such relief immediately after his conviction. The court discussed and distinguished *Rankine v. Reno, supra,* (cited by the BIA in Petitioner's case), noting that *Restrepo* "raises a separate and distinct reliance claim that *Rankine* did not have occasion to address since it arose outside the plea bargaining context." *Restrepo v. McElroy, supra,* at 636. The case was remanded for further factual development.

Most recently, the Fourth Circuit, whose decision in *Chambers v. Reno, supra,* was also cited by the BIA in Petitioner's case, has also added considerable gloss to the issues. In *Olatunji v. Ashcroft,* 387 F.3d 383 (4th Cir. 2004), the alien was convicted pursuant to a plea of guilty in 1994, subsequently traveled abroad in 1998, and was found inadmissible and ineligible for relief upon return to the United States. He argued in habeas corpus proceedings that the changes in the law attached new legal consequences – *i.e.,* his inability to travel – to his conviction.

The Government argued, however, that there was no improper retroactive effect unless the alien can demonstrate that "he almost certainly relied" upon his ability to take such trips when he entered his plea. *Olatunji v.*

Ashcroft, supra. The Fourth Circuit concluded, after a long and very thorough analysis of *INS v. St. Cyr, Landgraf,* and other Supreme Court precedents addressing retroactivity, that reliance is not a *sine qua non* of retroactive effect. Indeed, the Court noted:

> Retroactivity is a question of congressional intent. In the face of congressional silence on the temporal reach of a given statute, it is presumed that Congress did not intend for the statute to be applied retroactively. . . . Neither the dissent nŏr the government even attempts to relate its subjective reliance requirement to this fundamental underpinning of the prohibition on statutory retroactivity.

Olatunji v. Ashcroft, supra, at 389-390. The decision of the District Court denying Olatunji's habeas relief was reversed. In granting such relief, the Court discussed various precedents, including its own decision in *Chambers v. Reno* cited by the BIA, and found no holding that reliance upon existing law was *required* before retroactive effect may be found. The Third Circuit decision in *Ponnapula v. Ashcroft, supra,* was cited with approval.

E. The Need for Clarification

Petitioner respectfully urges that the position taken by the Third Circuit in *Ponnapula v. Ashcroft, supra*, is the most correct application of this Court's rulings on statutory retroactivity. In holding that *actual reliance* upon existing law, proven by a plea of guilty and *no other means*, was required to demonstrate that the repeal of §212(c) operates retroactively against the Petitioner, the Court of Appeals misapplied this Court's rulings on statutory

retroactivity resulting in an injustice to Petitioner and his family.

It is true, of course, that the petitioner in *St. Cyr* had been convicted pursuant to a plea of guilty, and there is much discussion by the Court of the "settled expectations" and reliance upon existing law inherent in plea agreements. However, nothing in the Court's decision expressly limits the holding – that repeal of §212(c) was not to be applied retroactively – to those cases involving plea agreements. Quite the contrary, the Court noted:

> A statute has retroactive effect when it "'takes away or impairs vested rights acquired under existing laws, or creates a new obligation, imposes a new duty, or attaches a new disability, in respect to transactions or considerations already past. . . .'" . . . . As we have repeatedly counseled, the judgment whether a particular statute acts retroactively "should be informed and guided by 'familiar considerations of fair notice, reasonable reliance, and settled expectations.'"

INS v. St. Cyr, supra, at 321 (internal citations omitted). In a footnote to this text, the Court cautioned that this language "does not purport to define the outer limit of impermissible retroactivity" but "simply describes several '*sufficient*,' as opposed to '*necessary*,' conditions for finding retroactivity." *Id.,* at n. 46 (emphasis in original, internal citations omitted).

It therefore cannot be said that a guilty plea was "necessary" for the repeal of §212(c) to have improper retroactive effect, although it was certainly "sufficient." Indeed, it is clear that courts should only with reluctance find *any* specific factor to be "necessary." The conditions sufficient for finding retroactivity ought to be considered

expansively because the overriding rule of retroactivity analysis is that **retroactive effect of new legislation is not favored**. *See, e.g., Landgraf v. USI Film Products, et al.*, 511 U.S. 244, 265 (1994), *Bowen v. Georgetown University Hospital, et al.*, 488 U.S. 204, 208 (1988). As this Court noted in *St. Cyr*:

> [This] presumption against retroactive legislation is deeply rooted in our jurisprudence, and embodies a legal doctrine centuries older than our Republic. . . . the 'principle that the legal effect of conduct should ordinarily be assessed under the law that existed when the conduct took place has timeless and universal human appeal.'

INS v. St. Cyr, supra, at 316 (internal citations omitted). The goal in retroactivity analysis therefore should be to construe retroactive effect *liberally* to maximize protection from the disfavored retroactive application. The goal should not be to minimize the number of individuals who benefit from that protection. To place "too high a barrier to triggering the presumption against retroactivity," as the Third Circuit noted, is to effectively reverse the presumption into a "a presumption *in favor* of retroactive application." *Ponnapula v. Ashcroft, supra,* at 491.

Petitioner was convicted and sentenced on September 24, 1996. There is no dispute that he was eligible for relief under INA §212(c) at all times prior to September 30, 1996, the date IIRIRA was enacted. He still meets the statutory criteria set forth in §212(c), and has already been found worthy of a discretionary grant by the Immigration Judge. The only potential bar to that relief is the fact that it was repealed by IIRIRA. Therefore, to hold that he cannot now apply for the relief that he and his family so desperately need unquestionably "takes away

vested rights acquired under existing laws," and "attaches a new disability, in respect to transactions or considerations already past." *INS v. St. Cyr, supra,* at 321. It therefore gives retroactive effect to the repeal of §212(c), which this Court held was not intended by Congress and is not to be done.

The courts that have found the guilty plea necessary under *St. Cyr* have done so on the assumption that a clearly identified act or decision was required to demonstrate reliance upon the continued existence of §212(c), and that no such act or decision could be found if the alien elected to go to trial. The possibility that the alien's decision to commit the crime or go to trial could have been influenced by the eventual availability of §212(c) relief is said to "border on the absurd." *Armendariz-Montoya v. Sonchik, supra,* at 1121; *Rankine v. Reno, supra,* at 101.

Yet the defendants in *Landgraf* were not required to demonstrate any reliance upon the absence of monetary damages or the possibility of a jury trial before the subsequent creation of these remedies were denied retroactive effect by this Court. Nor was Hughes Aircraft required to prove that it relied upon certain limitations on *qui tam* suits when it billed the United States Government for millions of dollars on aircraft contracts. *Hughes Aircraft Company v. United States ex rel Schumer,* 520 U.S. 939 (1997). Would it not be equally "absurd" to suggest that these companies relied upon existing law when they undertook the conduct that later resulted in legal actions against them?

As in *Hughes Aircraft* and *Landgraf*, the statutory change in this case took away or impaired vested rights

acquired under existing laws, or created new obligations, imposed new duties, or attached new disabilities, in respect to transactions or considerations already past. As stipulated below, Mr. SIDHU was eligible for §212(c) relief when he was convicted on September 24, 1996. The subsequent repeal of that relief took something very important away from him and his family. That repeal therefore had retroactive effect upon Petitioner.

CONCLUSION

For the reasons shown, Petitioner urges that he was legally eligible for relief under INA §212(c) and this Court's decision in *INS v. St. Cyr.* Petitioner prays that this petition for writ of certiorari be granted.

Respectfully submitted,

QUAN BURDETTE & PEREZ, P.C.

BRIAN K. BATES
Counsel of Record for Petitioner
5177 Richmond Ave., Suite 800
Houston, TX 77056
(713) 625-9225

2006 WL 1162196

UNITED STATES COURT OF APPEALS
for the Fifth Circuit

No. 04-60210

SAMARJEET SINGH SIDHU,

Petitioner,

VERSUS

ALBERTO R. GONZALES, U.S. ATTORNEY GENERAL,

Respondent.

Petition for Review of Orders
of the Board of Immigration Appeals

(Filed April 27, 2006)

(A38 007 490)

Before REAVLEY, JOLLY, and DeMOSS, Circuit Judges.

PER CURIAM:*

Petitioner Samarjeet Singh Sidhu ("Sidhu") filed a petition for review with this Court, asking us to review two decisions of the Board of Immigration Appeals ("BIA"). The first concluded that Sidhu is removable and ineligible

---

* Pursuant to 5TH CIR. R. 47.5, the Court has determined that this opinion should not be published and is not precedent except under the limited circumstances set forth in 5TH CIR. R. 47.5.4.

for relief from removal under the Immigration and Nationality Act ("INA") because he was convicted of an "aggravated felony" as defined therein, and the second concluded that he is not eligible for a waiver of inadmissibility under former section 212(c) of the INA pursuant to *INS v. St. Cyr*, 533 U.S. 289 (2001), because his conviction was the result of a jury trial rather than a guilty plea. Sidhu argues that he is not removable as an aggravated felon because his conviction did not have as an element "loss to the victim or victims" in excess of $10,000, as charged by the Immigration and Naturalization Service ("INS"), and that even if he is removable, he is nonetheless eligible for a waiver of inadmissibility under former section 212(c) because a guilty plea is not a prerequisite to relief pursuant to *St. Cyr*. Respondent Alberto R. Gonzales ("Gonzales") moved to dismiss the petition for review for lack of jurisdiction. That motion was carried with the case. Because we find that Sidhu's claims present questions of law, we have jurisdiction to consider the petition for review and the motion to dismiss is denied; however, we ultimately deny the petition for review because the BIA properly classified Sidhu's prior conviction as an aggravated felony and correctly held that Sidhu is not eligible for former section 212(c) relief.

I.

Sidhu was admitted to the United States as a lawful permanent resident in 1984. In 1996, Sidhu was convicted by a jury of conspiracy to commit mail fraud in violation of 18 U.S.C. §§ 1341 and 371; aiding and abetting mail fraud in violation of 18 U.S.C. §§ 1341 and 2; and making material false, fictitious, and fraudulent statements to federal investigators in violation of 18 U.S.C. § 1001. The

conviction was based on Sidhu's participation in a fraudulent billing scheme that was alleged in Count 1 of the indictment to have resulted in "approximately $1.2 million in fraudulent billings in 1993 and 1994." The jury found Sidhu guilty on that count, among others.

In 1999, Sidhu was charged by the INS with being subject to removal as an aggravated felon under section 237(a)(2)(A)(iii) of the INA, 8 U.S.C. § 1227(a)(2)(A)(iii). Specifically, the INS charged that Sidhu was removable because he was convicted of an "aggravated felony" as defined in subsections 101(a)(43)(M)(i) and (U), 8 U.S.C. § 1101(a)(43)(M)(i), (U).[2] Sidhu admitted through counsel all of the factual allegations, except the allegation that his conviction involved a "loss to the victim or victims" in excess of $10,000. On April 18, 2001, by written decision, the Immigration Judge ("IJ") found Sidhu subject to removal as charged and ineligible for relief from removal. Sidhu appealed the IJ's decision to the BIA and also submitted a supplemental brief arguing that he was eligible for relief under former section 212(c) of the INA pursuant to the newly decided *St. Cyr.* The BIA dismissed Sidhu's appeal, adopting the IJ's reasoning that because the jury found Sidhu guilty on Count 1 of the indictment, he was necessarily convicted of an aggravated felony as described in subsections 101(a)(43)(M)(i) and (U) of the INA. However, finding *St. Cyr's* scope unclear under a pending regulation, the BIA remanded Sidhu's case to the

---

[2] Subsection (M)(i) defines an aggravated felony as "an offense that involves fraud or deceit in which the loss to victim or victims exceeds $10,000," and subsection (U) defines an aggravated felony as "an attempt or conspiracy to commit an offense described in [§ 1101(a)(43)]." 8 U.S.C. § 1101(a)(43)(M)(i), (U).

IJ for consideration of whether he was eligible for former section 212(c) relief. On remand, the IJ granted Sidhu a waiver of inadmissibility under former section 212(c), and the Department of Homeland Security (formerly the INS) appealed the IJ's decision. The BIA found on appeal that Sidhu was not eligible for former section 212(c) relief because *St. Cyr's* rule of retroactivity was not applicable to aliens like Sidhu who were convicted by a jury and no relevant regulation broadened the scope of that rule. The BIA ordered Sidhu removed from the United States to Canada. Sidhu timely petitioned for review.

II.

This Court reviews questions of law as to jurisdiction *de novo. Ramirez-Molina v. Ziglar,* 436 F.3d 508, 513 (5th Cir. 2006). The REAL ID Act, Pub. L. No. 109-13, 119 Stat. 231 (2005), "amends 8 U.S.C. § 1252(a)(2)(C) to preclude all judicial review, habeas or otherwise, where a removal order is based on, *inter alia,* the alien's commission of an aggravated felony." *Hernandez-Castillo,* 436 F.3d at 519. However, "[t]he Act also altered the INA to provide that '[n]othing in subparagraph . . . (C) [of 8 U.S.C. § 1252(a)(2)] . . . shall be construed as precluding review of constitutional claims or questions of law raised upon a petition for review filed with an appropriate court of appeals in accordance with this section.'" *Id.* (quoting 8 U.S.C. § 1252(a)(2)(D)) (first alteration in original). Because both of Sidhu's claims – that his prior conviction does not qualify as an "aggravated felony" and that he is eligible for former section 212(c) relief – involve questions of law, we have jurisdiction to consider his petition for review. *See Rodriquez-Castro v. Gonzales,* 427 F.3d 316, 319 (5th Cir. 2005); *Hernandez-Castillo v. Moore,* 436 F.3d 516, 519 (5th

Cir. 2006). We review questions of law *de novo,* deferring to the BIA's interpretation of immigration regulations if that interpretation is reasonable. *Hernandez-Castillo,* 436 F.3d at 519.

Having carefully reviewed the record, the briefs, and the oral argument of the parties, we affirm the BIA's decision that Sidhu is removable as an aggravated felon essentially for the reasons stated by the BIA. We also affirm the BIA's decision that Sidhu is not eligible for former section 212(c) relief pursuant to *St. Cyr.* In *Hernandez-Castillo,* filed after the BIA issued its decision, we decided that a guilty plea is a necessary condition to former section 212(c) relief under *St. Cyr. Hernandez-Castillo,* 436 F.3d at 519-20. Sidhu was convicted following a jury trial; therefore, he is ineligible for former section 212(c) relief. *Id.*

Accordingly, the motion to dismiss for lack of jurisdiction is DENIED; and the petition for review is also DENIED.

U.S. Department of Justice
Executive Office for
Immigration Review

Falls Church, Virginia 22041

Decision of the Board of
Immigration Appeals

File: A38 007 490 – El Paso Date: FEB 26 2004

In re: SAMARJEET SINGH SIDHU

IN REMOVAL PROCEEDINGS

APPEAL

ON BEHALF OF RESPONDENT:
David P. Hanlon, Esquire

ON BEHALF OF DHS: David H. Burke
Assistant District Counsel

CHARGE:

Notice: Sec. 237(a)(2)(A)(iii), I&N Act [8 U.S.C. § 1227(a)(2)(A)(iii)] – Convicted of aggravated felony

APPLICATION: Waiver of inadmissibility

The case was last before the Board on October 19, 2001, where we dismissed the respondent's appeal challenging his removability under section 237(a)(2)(A)(iii) of the Immigration and Nationality Act ("Act"), 8 U.S.C. § 1227(a)(2)(A)(iii) (1999). However, we granted the respondent's motion to remand his case to determine his eligibility for a waiver of inadmissibility under section 212(c) of the Act, 8 U.S.C. § 1182(c) (1994). *See* 8 C.F.R. §§ 1003.44, 1212.3 (2003). On remand, the Immigration Judge granted the respondent a section 212(c) waiver and terminated the proceedings. The Department of Homeland Security (the "DHS," formerly the Immigration and Naturalization Service) appeals the immigration Judge's

April 18, 2002, decision. The respondent's request for oral argument is denied. *See* 8 C.F.R. § 1003.1(e)(7). The DHS's appeal will be sustained.

The United States Supreme Court in *INS v. St. Cyr,* 533 U.S. 289 (2001), held that the bars to section 212(c) relief enacted by section 440(d) of the Antiterrorism and Effective Death Penalty Act of 1996, Pub. L. No. 104-132, 110 Stat. 1214 ("AEDPA") (April 24, 1996), and section 304 of the Illegal Immigration Reform and Immigrant Responsibility Act of 1996, Div. C, Pub. L. No. 104-208, 110 Stat. 3009 (Sept. 30, 1996) ("IIRIRA"), do not apply retroactively to an alien who pled guilty or nolo contendere to an otherwise qualifying crime prior to IIRIRA's enactment. However, *INS v. St. Cyr, supra,* is inapplicable to aliens who were convicted by a jury trial. *See, e.g., Rankine v. Reno,* 319 F.3d 93 (2d 2003); *Chambers v. Reno,* 307 F.3d 284 (4th Cir. 2002); *Armendariz-Montoya v. Sonchik,* 291 F.3d 1116, 1122 (9th Cir. 2002). Since the respondent's aggravated felony conviction was the result of a jury trial, he is ineligible for a section 212(c) waiver pursuant to *INS v. St. Cyr, supra* (Exhs. 2, 2A).

In 2001, the Attorney General announced pending regulations were forthcoming, in light of *INS v. St. Cyr, supra,* potentially broadening the eligibility for section 212(c) waivers. It was in this environment that we remanded the case for consideration of the respondent's application for a section 212(c) waiver. A proposed rule, though not enacted, was issued on August 13, 2002, but it did not broaden the scope of *INS v. St. Cyr, supra,* to include aliens who were convicted of a jury trial prior to April 1, 1997. *See* 67 Fed. Reg. 52,627, 52,632 (Aug. 13, 2002) (requiring a guilty or nolo contendere plea for a section 212(c) waiver). Thus, under either current law or

the proposed regulation, the respondent is still ineligible for a section 212(c) waiver.

In his response brief, the respondent requests that we reconsider our previous decision regarding his removability, in the event the DHS's appeal is sustained. However, since we have already considered this issue in his first appeal on the merits, we decline to do so again.

Accordingly, the following orders will be entered.

ORDER: The DHS's appeal is sustained, and the Immigration Judge's April 4, 2001, decision is vacated.

FURTHER ORDER The respondent is order removed from the United States to Canada.

/s/ Fredrick D. Hess
FOR THE BOARD

[LOGO] **U.S. Department of Justice**
Executive Office for Immigration Review
Immigration Court

700 East San Antonio Street, Suite 675
El Paso, Texas 79901

FILE: A38 007 490

IN THE MATTER OF	§	
	§	IN IMMIGRATION
SAMARJEET SINGH SIDHU	§	COURT PROCEEDINGS
RESPONDENT	§	

WRITTEN DECISION OF THE IMMIGRATION JUDGE
and
ORDER OF REMOVAL FROM THE UNITED STATES

CHARGE: Section 237(a)(2)(A)(iii) of the Immigration and Nationality Act – To be removed as an alien who at any time after admission has been convicted of an aggravated felony as defined in section 101(a)(43)(M)(i) and (U) of the Act.

APPLICATION: Relief from removal under section 212(c) pursuant to *INS v. St. Cyr,* 533 U.S. 289 (2001), to be submitted on Form I-191.

I. CASE BACKGROUND

The respondent is an adult alien who was located in the United States and thereafter placed in proceedings before the Immigration Court. Previously, by written decision dated April 18, 2001, this court found all charges sustained and ordered that respondent be removed from the United States to Canada. Thereafter, respondent reserved the right of appeal, and by written decision dated

October 19, 2001, the Board of Immigration Appeals (BIA) affirmed the finding of removability. However, the BIA remanded the case for a determination on respondent's eligibility for an application for a waiver under section 212(c) of the Act, pursuant to *INS v. St. Cyr,* 533 U.S. 289 (2001).

II. RESPONDENT'S OPPORTUNITY TO PURSUE A WAIVER UNDER SECTION 212(c) TO AVOID REMOVAL FROM THE UNITED STATES

The respondent has the opportunity of pursuing any ***available*** forms of relief to avoid removal from the United States. The *St. Cyr* section 212(c) waiver only applies to convictions which were entered before April 24, 1996, the effective date of the Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA),[1] or September 30, 1996, the effective date of the Illegal Immigration Reform and Immigrant Responsibility Act of 1996[1] (IIRIRA), and **the evidence of record establishes that respondent's conviction was entered before September 30, 1996,** (Exhibits 2 and 2-A). Respondent was convicted on September 24, 1996, for his criminal behavior occurring in 1994, for Conspiring to commit mail fraud, aiding and abetting to commit mail fraud, and making material false, ficticious [sic], and fraudulent statements as to a matter within the jurisdiction of the Federal Bureau of Investigation and Defense Criminal Investigation Service. His criminal activities involved having willfully devised and

[1] Although IIRIRA resulted in a unified proceeding applicable to both arriving aliens and aliens present in the United States, Notices to Appear in Removal Proceedings on Form I-862 under §240 of the Act could not be issued by immigration authorities until April 1, 1997.

intending to devise a scheme to defraud and obtain money from insurance companies and government sponsored programs by means of false and fraudulent pretenses, representations, and promises.

A jury found respondent guilty on counts 1, 5, and 9, even though respondent had entered a plea of not guilty. A United States District Court Judge imposed a **37-month** sentence of incarceration on each count, which was to be served concurrently, and a fine of $2,000. **The United States District Court Judge allowed a 2 level adjustment in the sentencing because the respondent "played a minor role in the offense."** The United States Supreme Court on June 25, 2001, in the *St. Cyr* case emphasized that the date of conviction for an aggravated felony described within § 101(a)(43) of the Act should be carefully examined in order to determine eligibility for a waiver of removal under §212(c). *See INS v. St. Cyr,* 533 U.S. 289 (2001). It is also important to note that prior to either the enactment of either AEDPA or IIRIRA, respondent's criminal conviction on September 24, 1996, failed to satisfy the definition of an aggravated felony under either section 101(a)(43)(M) or (U) because the loss to the victim had to be at least $200,000, the amount of loss to the victims of respondent's criminal behavior was less than $200,000. However, after the enactment of IIRIRA, effective September 30,1996, the statutory loss to the victim was reduced to a minimum requirement of $10,000.

Aliens convicted of an aggravated felony and who served a term of imprisonment of at least 5 years prior to the effective date of the retroactive provisions of the AEDPA and IIRIRA, would not be able to satisfy the statutory requirement of being

eligible for a waiver for §212(c) relief under the law then in effect. *See Matter of Davis,* Interim Decision 3439 (BIA 2000) (alien who served more than 5 years in prison barred from establishing eligibility for §212(c) in accordance of that provision as in effect prior to the enactment of the AEDPA[2]); *see also Matter of Gomez-Giraldo,* 20 I&N Dec. 957, 959 (BIA 1995) (statutory bar for §212(c) relief where alien was convicted of an aggravated felony within meaning of § 101(a)(43) when alien has served term of imprisonment of at least 5 years at time of waiver request). *See also Matter of Ramireez-Somera,* 20 I&N Dec. 564 (BIA 1992) (case distinguishes between being sentenced to a term of at least five years imprisonment and having served five years imprisonment for an aggravated felony).

Having fully considered case precedent, immigration law, immigration regulations, and the evidence of record, this court determined that respondent was **statutorily eligible** to pursue a waiver under section 212(c) consistent with the ruling by the United States Supreme Court on June 25, 2001, in the *St. Cyr* case. First, the criminal conviction against respondent **occurred before September 30, 1996**. Second, the criminal conviction was **"not" deemed to be an aggravated felony before September, 30, 1996.** Third, the criminal sentence imposed was less than 5 years and respondent served less than 5 years **incarceration. Fourth, respondent had previously**

---

[2] The BIA emphasized in *Matter of Davis,* Interim Decision at 4 (BIA 3439), that before any amendments by the AEDPA enacted April 24, 1996, "section 212(c) . . . provided than any 'alien who has been convicted of one or more aggravated felonies and has served for such felony or felonies a term of imprisonment of a least 5 years' was barred from establishing eligibility for a waiver.

been admitted as a lawful permanent resident October 20, 1984. Fifth, respondent had **continuously resided in the United States for at least 7 years prior to his application for a waiver under section 212(c).**

III. DISCUSSION OF THE EXERCISE OF DISCRETIONARY AUTHORITY UNDER SECTION 212(c)

As there has been a finding of statutory eligibility for 212(c) relief as set forth above, the sole issue is whether respondent warrants this relief as a matter of discretion. More than fifty years ago, the BIA emphasized that when discretionary applications are before the court, each case must be evaluated on its own merits. *Matter of L-*, 3 I & N Dec. 767, 770 (BIA, A.G. 1949). Almost twenty-five years later, the BIA in *Matter of Marin,* 16 I & N Dec. 581, 584 (BIA 1978), specifically identified a list of important factors "relevant to the issue of whether section 212(c) relief should be granted as a matter of discretion." However, the BIA also pointed out that even though "in an individual case, one or more of these adverse factors may ultimately be determinative of whether section 212(c) relief is in fact granted, their presence does not preclude a respondent from presenting evidence in support of a favorable exercise of discretion." *Id.* In the *Marin* case, the BIA explained that "[i]t is the circumstances that the alien finds himself in as a result of his own misconduct that results in the varying difficulty for successful applications for discretionary relief." *Id.* The BIA noted that there must be a balancing of "the positive and adverse matters to determine whether discretion should be favorable [sic] exercised." *Id.* at 585. The BIA further explained that "[a]s the negative factors grow more serious, it becomes incumbent upon the applicant to introduce additional offsetting

favorable evidence, which in some cases may have to involve unusual or outstanding equities. Such a showing at times may be required solely by virtue of the circumstances and nature of the exclusion ground sought [to be] waived."[3] According to the BIA, "[t]he immigration judge must balance the adverse factors evidencing the alien's undesirability as a permanent resident with the social and humane considerations presented in his behalf to determine whether the granting of . . . relief appears in the best interest of this country." *Id.* at 584. Favorable factors may include the following:

> [F]amily ties within the United States, residence of long duration in this country (particularly when the inception of residence occurred at a young age), evidence of hardship to the respondent and his family if deportation occurs, service in this country's Armed Forces, a history of employment, the existence of property or business ties, evidence of value and service to the community, proof of genuine rehabilitation if a criminal record exists, and other evidence attesting to a respondent's good character.

Id. at 584-85.

> Among the factors deemed adverse to a respondent's application have been the nature and underlying circumstances of the exclusion ground [now removal or inadmissibility] at issue, the presence of additional significant violations of this country's immigration laws, the existence of

---

[3] *See also Matter of Arreguin,* Interim Decision 3247 (BIA 1995); *Matter of Burbano,* 20 I&N Dec. 872 (BIA 1994); *Matter of Roberts,* 20 I & N Dec. 294 (BIA 1991); *Matter of Edwards,* 20 I&N Dec. 191, 195-96 (BIA 1990); *Matter of Buscemi,* 19 I&N Dec. 628 (BIA 1988).

> a criminal record and, if so, its nature, recency, and seriousness, and the presence of other evidence indicative of a respondent's had character or undesirability as a permanent resident of this country.

In the instant case, the Court has carefully evaluated all of the relevant factors relating to respondent's application for a waiver under section 212(c). This Court has given great weight to respondent's 1996 conviction based upon his 1994 criminal activities involving fraud and deceit and a loss to the victim or victims of at least $10,000. This Court further notes that on September 24, 1996, when respondent was convicted, his offense failed to meet the definition of an aggravated felony under section 101(a)(43)(M) as the amount of loss to his victim or victims was less than the statutory amount of $200,000, which was then required under the Immigration and Nationality Act. Only after September 30, 1996, the enactment date of IIRIRA, was the statutory amount of loss to the victim or victims reduced to a threshold amount of $10,000.

Clearly, respondent was involved in a significant criminal conspiracy. Clearly, respondent's criminal activities involved fraud. Clearly, respondent intentionally engaged in criminal activities involving fraud. Nonetheless, this Court is required to carefully evaluate all relevant factors when considering respondent's application for discretionary relief to avoid being removed from the United States.

Respondent has expressed remorse for his criminal activities, while simultaneously minimizing the gravity of his actions. Respondent has repeatedly claimed that he did not join with others in committing fraud, but he has stated that after he became aware of his employer's fraudulent

activities and fraudulent billing practices for medical services, he failed to take any action to inform any law enforcement agencies. The **September 24, 1996**, judgment and order from the United States District Court specifically found that respondent was a **minor participant in the 1994 criminal activities** which serve as the basis to remove respondent from the United States; that there was a downward departure in the criminal level for purposes of sentencing; and that respondent was allowed to "self-surrender."

Although a showing of rehabilitation is not an absolute prerequisite in every case involving an alien with a criminal record, an alien who has a criminal record will ordinarily be required to present evidence of rehabilitation before relief is granted as a matter of discretion. *Matter of Marin*, 16 I & N Dec. 581, 588 (BIA 1978). Rehabilitation can be established by the absence of subsequent criminal conduct. *See Yepes-Prado v. US. INS*, 10 F.3d 1363, 1372-73 (9th Cir. 1993). Respondent expressed profound remorse for his criminal conviction. He stated that he is "ashamed" and "deeply regrets" his involvement. He testified that he **will never violate the law again** and that his conviction has caused great hardship to his family. The Court notes that since prior to his 1994 criminal activities, he had never been arrested, and that after his 1994 arrest, he has had no further criminal arrests. The September 24, 1996, conviction which serves as the basis for the immigration charge has been respondent's only conviction during his 18 years of residing in this country. In light of the foregoing, the Court concludes that Respondent has demonstrated rehabilitation and weighs this factor strongly in favor of a positive exercise of discretion.

Respondent has demonstrated significant other favorable factors in support of his application for a waiver under section 212(c), which include the following set forth in pertinent part below:

(1) Respondent's lengthy residence in the US (approximately 18 years);

(2) Respondent's gainful employment during most of those 18 years of being a lawful permanent resident alien;

(3) Respondent has significant family ties to the United States: a United States citizen spouse to whom he has been married for 17 years and four United States born children;

(4) Respondent has provided child support to his first United States born child, and even though respondent is divorced from that child's mother, respondent has satisfied all requirements for child support payments;

(5) Respondent has been an active member of the medical community in El Paso, Texas, and members of the medical community have demonstrated their support for the favorable exercise of discretion;

(6) Respondent's twin United States citizen daughters, now approximately 12 years of age, excel academically;

(7) **Respondent's 13-year old son has suffered from CEREBRAL PALSY since his birth in 1989;**

(8) **Respondent's 13-year old son has a severe impairment of cerebral palsy, epilepsy, and mental retardation;**

(9) Respondent's 13 year old son requires constant supervision and is under a physician's care for seizure disorder and sclerosis (Exhibit R-1, Tab FF);

(10) Respondent has provided his wife and children with a home in the United States and regularly reported his income through timely income tax filings with the IRS;

(11) Respondent's wife has ties to the medical community in El Paso, Texas, and is currently employed as a registered nurse with an agency in El Paso, Texas;

(12) Respondent has also been of assistance to another El Paso family with a disabled child (Exhibit R-1, Witness List Item 4);

(13) Respondent has been actively involved with his family, friends, and associates for almost two decades in the United States.

All of the equities set forth above are deemed to be positive. This court finds that the evidence establishes that respondent and his wife of 17 years have kept their family together while meeting the needs of their seriously disabled United States citizen son, who is now 13 years of age and who suffers from the debilitating effects of Cerebral Palsy, Epilepsy, and Mental Retardation (Exhibit R-1, Tab FF). Both respondent and his spouse have given generously of themselves, emotionally and physically, to provide a wholesome and loving home environment for their son, Samir. The evidence before this Court fully establishes that both of Samir's parents are necessary to his continued well-being. The evidence before this Court fully establishes that Samir currently lives in a loving and stable home environment, and that this loving and stable

home environment is significantly dependent upon the physical presence of his father within that home where the family has resided since 1995.

With respect to the testimony provided by both the respondent and his wife of 17 years concerning their efforts to provide for each of their three children, and in particular their efforts to provide for the **extraordinary needs of their severely disabled son since his birth in 1989, this Court finds that their testimony was fully credible in all respects. The evidence of record demonstrates that their 13-year old son requires constant assistance. Without the assistance of at least one adult, this child is unable to bathe, dress, walk, feed himself, and he requires daily medication because of his debilitating physical problems.** Both respondent and his spouse believe that their son should remain in the United States where he has access to schooling, medical care, and is familiar with his surroundings. Both respondent and his spouse believe that the physical and emotional needs of their son can be better accomplished by having both parents living with him in the same home in the United States. The record clearly establishes that the physical and emotional needs of this child have become more demanding on the family as this child has grown older and increased in physical size. Respondent's wife testified in a fully credible manner that their son needs to have both of his parents living together in the same home.

In evaluating the favorable and adverse factors in respondent's case, the Court concludes that the favorable factors, including Respondent's demonstrated rehabilitation, lengthy residence in the United States, lengthy employment history, purchase of a home, family in the

United States, and the situation involving his 13-year old severely disabled son outweigh the significant negative factors, namely respondent's September 24, 1996, criminal conviction for his 1994 fraudulent activities. The Court therefore finds the waiver under section 212(c) should be granted in the exercise of discretion. Accordingly, the following order is entered:

ORDER: IT IS ORDERED THAT THE APPLICATION FOR A SECTION 212(c) WAIVER UNDER ST. CYR BE GRANTED AND THESE PROCEEDINGS TERMINATED.

/s/ Penny M. Smith
Penny M. Smith
Immigration Judge

Dated: April 18, 2002

ALL PARTIES RECEIVED A COPY OF THE DECISION ON THE RECORD APRIL 18, 2002. RESPONDENT WAIVED THE RIGHT OF APPEAL. As stated on 4-18-02

INS RESERVED THE RIGHT OF APPEAL. until 5-20-2002

U.S. Department of Justice
Executive Office for Immigration Review
Falls Church, Virginia 22041

Decision of the Board of Immigration Appeals

File: A38 007 490 – El Paso Date: OCT 19 2001

In re: SAMARJEET SINGH SIDHU

IN REMOVAL PROCEEDINGS

APPEAL AND MOTION

ON BEHALF OF RESPONDENT: Daniel P. Hanlon, Esquire

ON BEHALF OF SERVICE: Robert S. Hough
Assistant District Counsel

CHARGE:

Notice: Sec. 237(a)(2)(A)(iii), I&N Act [8 U.S.C. § 1227(a)(2)(A)(iii)] – Convicted of aggravated felony

APPLICATION: Removability; remand

The respondent is a native of India and a citizen of Canada who entered the United States on January 20, 1984, as an immigrant. On September 24, 1996, he was convicted for the offense of conspiracy to commit mail fraud in violation of 18 U.S.C. §§ 1341 and 371; aiding and abetting to commit mail fraud in violation of 18 U.S.C. §§ 1341 and 1342; and making material false, fictitious, and fraudulent statements as to a matter within the jurisdiction of the Federal Bureau of Investigation and Defense Criminal Investigation Service in violation of 18 U.S.C. § 1001. It is alleged that the loss to the victims of his crimes exceeded $10,000. Based on these convictions, the respondent was placed into removal proceedings and

charged with being subject to removal on the above-captioned charge. By written decision dated April 18, 2001, the Immigration Judge found the respondent to be subject to removal as charged and ineligible for relief from removal. The respondent was ordered removed from the United States to Canada. The respondent's appeal from that decision will be dismissed. However, while his appeal was pending he filed a supplemental brief which we will treat as a motion to remand, arguing that he is eligible for a waiver of inadmissibility under section 212(c) of the Immigration and Nationality Act, 8 U.S.C. § 1182(c). The respondent's case will be remanded to the Immigration Judge for consideration of his argument that he is eligible for a waiver of inadmissibility.

The respondent is charged with being removable as an aggravated felon pursuant to section 237(a)(2)(A)(iii) of the Immigration and Nationality Act, 8 U.S.C. § 1227(a)(2)(A)(iii). Specifically, he is charged with having committed an aggravated felony as described in sections 101(a)(43)(M) (an offense that involves fraud or deceit in which the loss to the victim or victims exceeds $10,000) and 101(a)(43)(U) (an attempt or conspiracy to commit an offense described in section 101(a)(43) of the Act) of the Act, 8 U.S.C. § 1101(a)(43)(M) and (U). The respondent admits that he is not a citizen of the United States, and he admits that he was convicted of the above-mentioned crimes. However, he disputes that the loss to the victim or victims exceeded $10,000, and he denies the charge of removability.

The Immigration Judge found that the record of criminal judgment (Exh. 2-A) supported a finding that the respondent had been convicted of the offenses described above. We agree. As the Immigration Judge pointed out, Count 1 of the indictment for conspiracy to commit mail

fraud (Exhs. 2 and 2-A) specifically identifies the respondent in the criminal activity, and that "[a]ll of the billing for healthcare related services allegedly conducted by Defendant Gifford or at his direction by Defendants Paichuk and Sidhu were billed on HCFA 1500 forms and mailed . . . to insurance, companies." The evidence establishes that "[f]rom or about January 1, 1993, until on or about August 10, 1994, . . . Defendants, Loren Arden Gifford, Aghavni Paichuk, and Smarjeet [sic] Sidhu, aided and abetted by each other, willfully devised and intended to devise a scheme and artifice to defraud and obtain money from insurance companies and government sponsored programs . . . by means of false and fraudulent pretenses, representations, and promises." The respondent and others regularly caused insurance companies and government sponsored programs to be billed for services to patients for services which were not performed, were not performed as billed, or were performed by associates for whose services the criminal defendants were not entitled to be reimbursed. "This activity resulted in approximately $1.2 million in fraudulent billings in 1993 and 1994" (Exh. 2, paragraph 23, pages 5-6).

The Immigration Judge thoroughly and correctly analyzed the relevant criminal statutes and decided that the respondent had been convicted of crimes which constitute aggravated felonies under sections 101(a)(43)(M)(i) and 101(a)(43)(U) of the Act (I.J. at 5-9). We agree with that analysis and adopt it here. The respondent's primary contention on appeal is that he has not been convicted of an aggravated felony because there is no proof that the loss to the victim or victims exceeded $10,000. We reject this argument. We find the evidence of record sufficient to establish that the respondent was convicted of fraudulent

activities where the loss to the victim or victims exceeded $10,000.

The respondent was found guilty by jury verdict on May 24, 1996, for counts 1, 5, 6, and 9 of the criminal indictment (Exhs. 2 and 2-A). Among the allegations in count 1 of the indictment, for which the respondent was found to be guilty, was that the conspirators, including the respondent, "regularly caused insurance companies and government sponsored programs to be billed for . . . services to patients for services which were not performed, were not performed as billed, or were performed by associates, such as . . . Samarjeet S. Sidhu, for whose services defendant Gifford was not entitled to be reimbursed. This activity resulted in approximately $1.2 million in fraudulent billings in 1993 and 1994." Thus, the loss to the victims of the fraud the respondent was involved in exceeded $10,000. The respondent argues that an indictment is only an allegation. However, the jury found him to be guilty on this count. Therefore, we agree with the Immigration Judge that the respondent is removable as an aggravated felon, and therefore not entitled to various forms of relief he sought For these reasons, because we agree with the Immigration Judge's decision, and because we are not persuaded by any of the respondent's arguments on appeal,[1] the appeal will be dismissed to the extent that the respondent argues he has not been convicted of an aggravated felony.

---

[1] We also note that we are without authority to entertain the respondent's arguments regarding the constitutionality of the statute rendering him removable. *See Matter of C-*, 20 I&N 529, 532 (BIA 1992).

In the respondent's supplemental brief, he argues that he is eligible for a waiver of inadmissibility pursuant to section 212(c) of the Act for any conviction which predated the amendments to the Immigration and Nationality Act made by the Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA) and the Illegal Immigration Reform and Immigrant Responsibility Act of 1996 (IIRIRA). The United States Supreme Court recently determined that the amendments restricting the availability of waivers of inadmissibility pursuant to section 212(c) of the Act do not apply retroactively to aliens who pled guilty prior to April 24, 1996. *See INS v. St. Cyr*, 121 S. Ct. 2271 (2001). The respondent was convicted an September 24, 1996, and his conviction was not pursuant to a plea.[2] However, a pending regulation with a potentially broader reach than *St. Cyr* is expected to provide further guidance on this issue. Thus, the respondent may remain eligible for a waiver of inadmissibility pursuant to section 212(c) of the Act. We note that the Service has not opposed the respondent's request for consideration of a waiver of inadmissibility. For these reasons, we find it appropriate to remand this case to the Immigration Judge for consideration of the respondent's request for a waiver of inadmissibility pursuant to section 212(c) of the Act. Accordingly, the following orders shall be entered.

ORDER: The appeal is dismissed.

FURTHER ORDER: The record is remanded to the Immigration Court for consideration of the respondent's

[2] The effective date of AEDPA was April 24,1996, and the effective date of IIRIRA was September 30, 1996.

application for a waiver of inadmissibility under section 212(c) of the Immigration and Nationality Act.

/s/ Neil P. Miller
FOR THE BOARD

DISSENTING OPINION:
Cecelia M. Espenoza, Board Member

I respectfully dissent:

I would terminate the respondent's removal proceedings because I agree with his argument that he has not been convicted of an aggravated felony as the record does not establish that the loss to his victim or victims exceeded $10,000. *See* section 101(a)(43)(M) of the Immigration and Nationality Act, 8 U.S.C. § 101(a)(43)(M) (an offense that involves fraud or deceit in which the loss to the victim or victims exceeds $10,000). To begin, I would note that the criminal judgment in this case, dated September 24, 1996, does not purport to set forth an "amount of loss" to the victim or victims, nor do the statutes under which the respondent was convicted require that a specific amount of loss be found in order for the conviction to stand. The United States Court of Appeals for the Second Circuit recently decided that in determining whether a respondent is removable as an aggravated felon, we must look to the elements of the offense, and not the factual circumstances of the particular case, *Sui v. INS*, 250 F.3d 105, 116 (2nd Cir 2001). The Court in *Sui* found that it was inappropriate for the Board to act as fact finder and look behind the statute of conviction and the indictment to determine whether, in the particular circumstances of the case, the actions of the alien constituted an aggravated

felony. Under such a standard, the respondent in the case before us would not qualify as an aggravated felon because a loss to the victim or victims in excess of $10,000 is not an element of the crime.

I also agree with the respondent's argument that the indictment is not adequate evidence, to sustain the amount of loss to the victim or victims. In this regard, I note that the respondent's plea was to 1 day (January 21, 1994) in the scheme, and that there is no evidence in the record that the loss on that particular day was greater than $10,000 (Exh. 2). Moreover, the Immigration Judge relied on paragraphs in the indictment which referred not only to the acts of the respondent, but also to those of his, criminal co-defendants (Exh. 2). Thus, it is impossible for us to determine whether the respondent himself, rather than his criminal co-defendants, was responsible for fraud or deceit in which the loss to the victim or victims exceeds $10,000. Because the record does not clearly establish that the respondent was convicted for an offense involving fraud or deceit where the loss to the victim or victims exceeded $10,000, I would find he has not been shown to be removable as charged, and I would terminate his removal proceedings.

Consequently, I dissent.

/s/ Cecelia M. Espenoza
Cecelia M. Espenoza
Board Member

U.S. Department of Justice

Executive Office for Immigration Review

Immigration Court

700 E. San Antonio St., Suite 675
El Paso, Texas 79901

FILE: A38 007 490

IN THE MATTER OF SIDHU, SAMARJEET SINGH RESPONDENT	§ § § §	IMMIGRATION COURT REMOVAL PROCEEDINGS

CHARGE: Section 237(a)(2)(A)(iii) of the Immigration and Nationality Act – Conviction for an aggravated felony under sections 101(a)(43)(m)(i) and 101(a)(43)(U) of the Act.

APPLICATION: Motion to Terminate Removal Proceedings. Cancellation of Removal Pursuant to Section 240A of the Act. Adjustment of Status Pursuant to Section 245 and 212(h) of the Act.

ON BEHALF OF THE RESPONDENT:

Daniel P. Hanlon, Esq.
215 N. Marengo Ave., Suite 195
Pasadena, CA 91101

ON BEHALF OF THE INS:

Robert Hough, Esq.
Asst. District Counsel
1545 Hawkins Blvd.
El Paso, Texas 79925

WRITTEN DECISION OF THE IMMIGRATION JUDGE

I. CASE BACKGROUND

The respondent is an adult male alien, native and citizen of Canada, who was admitted to the United States at El Paso, Texas as a lawful permanent resident alien on

or about January 20, 1984, then being accorded the status of a lawfully admitted permanent resident. On September 24, 1996, the respondent was convicted in the United States District Court, Western District of Texas for the offense of Conspiring to Commit Mail Fraud in violation of Title 18 USC 1341 and 371; and Aiding and Abetting to Commit Mail Fraud in violation of Title 18 USC 1341 and 2; and Making Material False, Fictitious, and Fraudulent Statements as to a Matter within the Jurisdiction of the Federal Bureau of Investigation and Defense Criminal Investigation Service, in violation of Title 18 USC 1001 (Exhibits 2 and 2-A). As a consequence of respondent's criminal convictions as set forth above, the Immigration and Naturalization Service (INS) on April 19, 1999, issued a Notice to Appear in Removal Proceedings Under Section 240 of the Immigration and Nationality Act (the Act) (Exhibit 1) against the aforementioned respondent. Thereafter, the INS issued additional allegations and charges (Exhibits 1-A and 1-B). The INS alleged on Form I-261, dated March 26, 2001, (Exhibit 1-A) that the loss to the victim exceeded $10,000, and clarified that the charge of having an aggravated felony conviction was defined in section 101(a)(43)(M) of the Act. The INS alleged on Form I-261, dated April 4, 2001 (Exhibit 1-B) an aggravated felony as defined in section 101(a)(43)(U) of the Act.

During the proceeding before the Immigration Court, respondent had legal representation. Respondent, through legal counsel, admitted the allegations of fact regarding Canadian citizenship, that he was not a citizen of the United States, that he had been admitted into the United States as a lawful permanent resident in 1984, and that he had been convicted of the criminal offenses described above. However, the respondent, through legal counsel,

denied the allegation regarding a loss to the victim of more than $10,000, and denied all charges of removal. The record also contains documentary evidence relating to the criminal indictment and judgment of conviction with a finding of guilty by jury verdict on May 24, 1999, for counts 1, 5, 6, and 9 with a criminal sentence of imprisonment of 37 months on each of the counts (Exhibits 2 and 2-A) for conspiring to commit mail fraud (Date of offense 8-10-94 for Count 1), aiding an abetting to commit mail fraud (Date of offense 1-21-94 for Counts 5 and 6), and making material false, fictitious, and fraudulent statements as to a matter withing [sic] the jurisdiction of the Federal Bureau of Investigation and Defense Criminal Investigation Service (Date of offense 8-10-94 for Count 9). The above referenced documentary evidence was offered by the INS in support of the allegations and charges for removal under sections 237(a)(2)(A)(iii), 101(a)(43)(M)(i), and 101(a)(43)(U) of the Act (Exhibits 1, 1-A, and 1-B).

II. DISCUSSION REGARDING AGGRAVATED FELONY CHARGE UNDER SECTIONS 237(a)(2)(A)(iii), 101(a)(43)(M)(i), AND 101(a)(43)(U) OF THE ACT

The criminal judgment (Exhibit 2-A) supports a finding by the Immigration Court that respondent has been convicted of the offenses as set forth above consistent with the statutory definition of conviction and what constitutes a sentence to confinement for purposes of immigration law under section 101(a)(48)(A) and (B) of the Act. Respondent, through legal counsel, has denied that the loss to any victim of the offense exceeded $10,000. Respondent, through legal counsel, has denied both of the immigration charges against him and has moved for termination of proceedings. The court notes that respondent would **not** be

eligible for either cancellation of removal or voluntary departure pursuant to sections 240A and 240B of the Act if the charge under section 237(a)(2)(A)(iii) is sustained.

The Board of Immigration Appeals (BIA) considered an aggravated felony charge and the effect of section 101(a)(43)(U) of the Act in relation to a criminal conviction for submitting a false claim with intent to defraud arising from an unsuccessful scheme to obtain $15,000 from an insurance company in *Matter of Onyido*, Interim Decision 3379 at 3 (BIA 1999). The BIA pointed out that "[s]ection 101(a)(43)(M)(i) of the Act provides that the term 'aggravated felony' includes an offense that 'involves fraud or deceit in which the loss to the victim or victims exceeds $10,000.'" Additionally the BIA emphasized that "[s]ection 101(a)(43)(U) of the Act provides that the term 'aggravated felony' also includes 'an attempt or conspiracy to commit an offense described in [section 101(a)(43)].'" *Id.*

In making a determination as to whether or not the respondent has been convicted of an offense which falls within the definition of either section 101(a)(43)(M)(i) or section 101(a)(43)(U) of the Act, it becomes imperative to fully analyze the relevant statutory provisions relating to respondent's multi-count criminal conviction in violation of United States law under Title 18 as identified above. Count 1 (18 U.S.C. §371/1341) for conspiring to commit mail fraud (Exhibits 2 and 2-A) specifically identifies the respondent (paragraph 3, page 2) in the criminal activity, and that "[a]ll of the billing for health care related services allegedly conducted by **Defendant Gifford** or at his direction by **Defendants Paichuk** and **Sidhu** were billed

on HCFA 1500 forms and mailed . . . to insurance companies."[1] The INS evidence establishes that "[f]rom on or about January 1, 1993, until on or about August 10, 1994, . . . **DEFENDANTS, LOREN ARDEN GIFFORD, AGHAVNI PAICHUK, and SMARJEET SIDHU**, aided and abetted by each other, willfully devised and intended to devise a scheme and artifice to defraud and obtain money from insurance companies and government sponsored programs including Blue Cross/Blue Shield of Texas, Medicare Part B, Medicaid, . . . and others, by means of false and fraudulent pretenses, representations, and promises."[2] The INS evidence establishes that "**DEFENDANT LOREN ARDEN GIFFORD** regularly caused insurance companies and government sponsored programs to be billed for his services to patients for services which were not performed, were not performed as billed, or were performed by associates, such as **DEFENDANTS AGHAVNI PAICHUK AND SAMARJEET S. SIDHU**, for whose services DEFENDANT GIFFORD was not entitled to be reimbursed. This activity resulted in approximately $1.2 million in fraudulent billings in 1993 and 1994."[3] The INS evidence establishes that "DEFENDANTS LOREN ARDEN GIFFORD, and SAMARJEET S. SIDHU, caused various insurance companies and government sponsored programs to be fraudulently billed for biofeedback services performed by DEFENDANT SIDHU while in truth and in fact, as DEFENDANTS GIFFORD AND

---

[1] Exhibit 2, paragraph 13, page 3.

[2] Exhibit 2, paragraph 22, page 5.

[3] Exhibit 2, paragraph 23, pages 5-6.

SIDHU well knew, DEFENDANT SIDHU had not performed said services."[4]

Section 371 of 18 USC sets forth the statutory provisions relating to conspiracy to commit offense or to defraud the United States as follows:

> If two or more persons conspire either to commit any offense against the United States, or to defraud the United States, or any agency thereof in any manner or for any purpose, and one or more of such persons do any act to effect the object of the conspiracy, each shall be fined under this title or imprisoned not more than five years, or both.
>
> If, however, the offense, the commission of which is the object of the conspiracy, is a misdemeanor only, the punishment for such conspiracy shall not exceed the maximum punishment provided for such misdemeanor. 18 USC §371 (1996)

Section 1341 of 18 USC sets forth the statutory provisions relating to frauds and swindles as follows:

> Whoever, having devised or intending to devise any scheme or artifice to defraud, or for obtaining money or property by means of false or fraudulent pretenses, representations, or promises, or to sell, dispose of, loan, exchange, alter, give away, distribute, supply, or furnish or procure for unlawful use any counterfeit or spurious coin, obligation, security, or other article, or anything represented to be or intimated or held out to be such counterfeit or spurious article, for the purpose of executing such scheme or artifice or

[4] Exhibit 2, paragraph 26, page 6.

attempting so to do, places in any post office or authorized depository for mail matter, any matter or thing whatever to be sent or delivered by the Postal Service, or deposits or causes to be deposited any matter or thing whatever to be sent or delivered by any private or commercial interstate carrier, or takes or receives therefrom, any such matter or thing, or knowingly causes to be delivered by mail or such carrier according to the direction thereon, or at the place at which it is directed to be delivered by the person to whom it is addressed, any such matter or thing, shall be fined under this title or imprisoned not more than five years, or both. If the violation affects a financial institution, such person shall be fined not more than $1,000,000 or imprisoned not more than 30 years, or both.

18 USC §1341 (1996)

Section 3581 of 18 USC sets forth the authorized terms of imprisonment for violations of United States law as follows:

(a) **In general.** – A defendant who has been found guilty of an offense may be sentenced to a term of imprisonment.

(b) **Authorized terms.** – The authorized terms of imprisonment are –

(1) for a Class A felony, the duration of the defendant's life or any period of time;

(2) for a Class B felony, not more than twenty-five years;

(3) for a Class C felony, not more than twelve years;

(4) for a Class D felony, not more than six years;

(5) for a Class E felony, not more than three years;

(6) for a Class A misdemeanor, not more than one year;

(7) for a Class B misdemeanor, not more than six months;

(8) for a Class C misdemeanor, not more than thirty days; and

(9) for an infraction, not more than five days.

18 USC §3581 (1996)

Section 2 of 18 USC sets forth the authorized terms of imprisonment for violations of United States law as follows:

(a) Whoever commits an offense against the United States or aids, abets, counsels, commands, induces or procures its commission, is punishable as a principal.

(b) Whomever willfully causes an act to be done which is directly performed by him or another would be an offense against the United States, is punishable as a principal.

18 USC §2 (1996)

The criminal record before the Immigration Court (Exhibits 2 and 2-A) fully supports a finding that the respondent has been convicted of a felony offense under 18 USC §§1341 and 371 on Count 1 and sentenced to a period of 37 months incarceration. The criminal record before the

Immigration Court (Exhibits 2 and 2-A) fully supports a finding that the respondent has been convicted of a felony offense under 18 USC §§1341 and 2 on Counts 5 and 6 and sentenced to a period of 37 months incarceration on each of those Counts. The Immigration Court, having fully considered the statutory elements of the previously identified criminal offenses as set forth above finds that the evidence of record establishes that respondent has been convicted of an aggravated felony as defined under section 101(a)(43)(M)(i) and for an aggravated felony as defined under section 101(a)(43)(U) of the Act. *See Matter of Onyido*, Interim Decision 3379 (BIA 1999). As respondent was convicted of the underlying criminal behavior in **1996**, he is clearly an alien who has been convicted of an aggravated felony after he was admitted as a permanent resident in 1984. Therefore, both charges of removability as set forth above have been established by evidence which is clear and convincing consistent with section 240(c)(3) of the Act; 8 C.F.R. 240.8(a). The government's evidence also reaches the level of unequivocal which satisfies the standard set forth in *Woodby v. INS*, 385 U.S. 276 (1966).

III. DISCUSSION OF DIFFERENT FORMS OF RELIEF TO AVOID BEING REMOVED FROM THE UNITED STATES

Because the respondent has been convicted of an aggravated felony as defined in immigration law, respondent's motion to terminate based upon the denial of the charges will be denied. Respondent is **not** seeking asylum, nor protection against torture. Respondent appears to be ineligible for adjustment of status for he would be within an inadmissable [sic] class of aliens under section 212(a)(2)(A)(i)(I) as an alien convicted of a crime involving

moral turpitude (CIMT) or an attempt or conspiracy to commit such a crime (other than purely political offenses).

In order for respondent to be eligible for adjustment of status, respondent must **not** be within a class of inadmissable [sic] aliens identified in section 212(a) of the Act. The Immigration and Nationality Act (the Act) does not define the term "crime involving moral turpitude." *Hamdan v. INS*, 98 F.3d 183, 185 (5th Cir. 1996).

The BIA has previously noted that a state's determination of which crimes involve moral turpitude is not conclusive for immigration law purposes. *See Matter of Medina*, 15 I&N Dec. 611, 614 (BIA 1976) citing *Gonzales v. Barber*, 207 F.2d 398, 400 (C.A. 9 1953), *aff'd*, 374 U.S. 637 (1954). "Moral turpitude is a nebulous concept that refers generally to conduct which is inherently base, vile, or depraved, contrary to the accepted rules of morality and the duties owed between persons or to society in general." *Matter of Tran*, 21 I&N Dec. 291, 292 (BIA 1996). The BIA has repeatedly examined the concept of what constitutes a CIMT.[5] "Moral turpitude has been defined as an act that is per se morally reprehensible and intrinsically wrong, or malum in se, so it is the nature of the act itself and not the statutory prohibition of it which renders a crime one of moral turpitude." *Matter of Tran*, 21 I&N Dec. 291, 293

---

[5] *See Matter of Franklin*, 20 I&N Dec. 867, 868 (BIA 1994), *aff'd*, 72 F.3d 571 (8th Cir. 1995), *cert. denied*, 519 U.S. 834 (1996); *Matter of Danesh*, 19 I&N Dec. 669 (BIA 1988); *see also Matter of Flores*, 17 I&N Dec. 225, 227 (BIA 1980); *Matter of McNaughton*, 16 I&N Dec. 569 (BIA 1978); *Matter of Baker*, 15 I&N Dec. 50 (BIA 1974); *Matter of S-*, 2 I&N Dec. 353 (BIA, A.G. 1945); *Matter of G-*, 1 I&N Dec. 73 (BIA 1941, A.G. 1941).

(BIA 1996).[6] The BIA determined that the analysis of an alien's intent is critical to a determination regarding an offense involving moral turpitude, specifically explaining that "[i]t is . . . a question of the offender's evil intent or corruption of the mind." *Matter of Serna*, 20 I&N Dec. 579, 581 (BIA 1992). The fact that an individual is convicted of a misdemeanor rather than a felony "does not preclude a finding that it involves moral turpitude." *Id.* at 582.

"In a determination whether a crime involves moral turpitude, the statute under which the conviction occurred is controlling. (citations omitted) If the statute [at issue] defines a crime in which turpitude necessarily inheres, then for immigration purposes, the conviction is for a crime involving moral turpitude." *See Matter of Khourn*, 21 I&N Dec. 1041, 1044 (BIA 1997).

This Court is fully satisfied that respondent's criminal activities involving a conspiracy to commit mail fraud and aiding and abetting to commit mail fraud for which he was convicted September 24, 1996 (Exhibits 2 and 2-A) support a determination that he has been convicted of a crime involving moral turpitude as that term is understood in immigration law. The crime for which respondent was convicted involves the use fraud, or false or fraudulent pretenses, and resulted in approximately $1.2 million in fraudulent billings in 1993 and 1994. (Exhibit 2, paragraph 23, pages 5-6). Therefore, respondent is **not** eligible for adjustment of status under section 245 of the Act as a means of avoiding removal from the United States. Therefore, the

---

[6] For a further discussion *see Matter of Perez-Contreras*, 20 I&N Dec. 615 (BIA 1992); *Matter of Short*, 20 I&N Dec. 136 (BIA 1989); *Matter of Esfandiary*, 16 I&N Dec. 659 (BIA 1979); *Matter of P-*, 6 I&N Dec. 795 (BIA 1955).

Court will pretermit any hearing on adjustment of status, cancellation of removal, or voluntary departure and will deny all of those forms of relief for lack of statutory eligibility. Respondent, specifically declined to pursue protection against torture or asylum. Under the facts and circumstances of this case there is no relief available to excuse respondent from being removed from the United States. As respondent is **not** eligible for either cancellation of removal[7] pursuant to section 240A of the Act or for voluntary departure[8] pursuant to section 240B of the Act because of his conviction for an aggravated felony as defined under section 101(a)(43) of the Act, the following is the order of the court.

---

[7] Respondent is statutorily barred from Cancellation of Removal under Section 240A(a) because of the aggravated felony conviction which serves as the basis of the removal charge. The BIA has determined that a conviction for an aggravated felony will be a statutory bar to certain forms of relief, i.e., an aggravated felony conviction as defined in Section 101(a)(43)(B) of the Act will preclude relief under sections 240A(a)(3); 240A(b)(1)(B); 240B(b)(1)(C); 212(h) of the Act. *In re Perez*, Interim Decision 3389, at 3 (BIA 1999) (aliens convicted of an aggravated felony are not eligible for cancellation of removal). To pursue Cancellation of Removal pursuant to Section 240A(a) of the Act, a Form EOIR-42A is filed with the Immigration Court; however, for the reasons contained in the record of proceeding, respondent is statutorily ineligible for this form of relief and this Court **pretermitted** any hearing on an application for cancellation.

[8] *In re Arguelles*, Interim Decision 3399 (BIA 1999) (while an alien may apply for voluntary departure either in lieu of being subject to removal proceedings or before the conclusion of the proceedings under section 240B of the Act, such relief is **not** available to aliens convicted of an aggravated felony as that term is understood in immigration law).

ORDER

ORDER: IT IS HEREBY ORDERED that respondent's motion to terminate be denied.

ORDER: IT IS FURTHER ORDERED that the Respondent be denied cancellation of removal pursuant to section 240A of the Act.

ORDER: IT IS FURTHER ORDERED that any application for voluntary departure pursuant to section 240B of the Act be denied.

ORDER: IT IS FURTHER ORDERED that the Respondent be removed from the United States to Canada (as designated on the record) pursuant to Section 237(a)(2)(A)(iii) of the Act.

Date: 4-18-01

/s/ Penny M. Smith
Penny M. Smith
Immigration Judge

Supreme Court, U.S.
FILED
SEP 27 2006
OFFICE OF THE CLERK

No. 06-140

In the Supreme Court of the United States

SAMARJEET SIDHU, PETITIONER

ALBERTO R. GONZALES, ATTORNEY GENERAL

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

PAUL D. CLEMENT
Solicitor General
Counsel of Record
PETER D. KEISLER
Assistant Attorney General
DONALD E. KEENER
BARRY J. PETTINATO
Attorneys
Department of Justice
Washington, D.C. 20530-0001
(202) 514-2217

QUESTION PRESENTED

As a result of the 1996 amendments to the Immigration and Nationality Act, see Illegal Immigration Reform and Immigrant Responsibility Act of 1996, Pub. L. No. 104-208, Div. C, § 304(b), 110 Stat. 3009-597; Antiterrorism and Effective Death Penalty Act of 1996, Pub. L. No. 104-132, § 440(d), 110 Stat. 1277, a removable alien is ineligible for discretionary relief from removal if the alien was previously convicted of an aggravated felony. In *INS* v. *St. Cyr*, 533 U.S. 289 (2001), this Court, based on principles of non-retroactivity, held that the 1996 amendments did not apply to an alien convicted of an aggravated felony through a plea agreement at a time when the conviction would not have rendered the alien ineligible for discretionary relief. The question presented is whether this Court's holding in *St. Cyr* applies to an alien convicted of an aggravated felony after trial.

TABLE OF CONTENTS

Page

Opinions below 1
Jurisdiction 1
Statement 1
Argument 4
Conclusion 11

TABLE OF AUTHORITIES

Cases:

Armendariz-Montoya v. *Sonchik*, 291 F.3d 1116 (9th Cir. 2002), cert. denied, 539 U.S. 902 (2003) 7

Brooks v. *Ashcroft*, 283 F.3d 1268 (11th Cir. 2002) 7

Chambers v. *Reno*, 307 F.3d 284 (4th Cir. 2002) 7, 9

Dias v. *INS*, 311 F.3d 456 (1st Cir. 2002), cert. denied, 539 U.S. 926 (2003) 7

Fernandez-Vargas v. *Gonzales*, 126 S. Ct. 2422 (2006) ... 6

Hem v. *Maurer*, 458 F.3d 1185 (10th Cir. 2006) 4, 6, 7, 10

Hernandez-Castillo v. *Moore*, 436 F.3d 516 (5th Cir. 2006), petition for cert. pending, No. 05-1251 (filed Mar. 28, 2006) 11

INS v. *St. Cyr*, 533 U.S. 289 (2001) 2, 5, 6

Montenegro v. *Ashcroft*, 355 F.3d 1035 (7th Cir. 2004) ... 7

Olatunji v. *Ashcroft*, 387 F.3d 383 (4th Cir. 2004) 9

Ponnapula v. *Ashcroft*, 373 F.3d 480 (3d Cir. 2004) 4, 7, 8, 9

Cases—Continued: Page

Rankine v. *Reno*, 319 F.3d 93 (2d Cir.), cert. denied, 540 U.S. 910 (2003) 6, 7
Restrepo v. *McElroy*, 369 F.3d 627 (2d Cir. 2004) 10
Reyes v. *McElroy*, 543 U.S. 1057 (2005) 5
Stephens v. *Ashcroft*, 543 U.S. 1124 (2005) 5
Thom v. *Ashcoft:*
369 F.3d 158 (2d Cir. 2004), cert. denied, 126 S. Ct. 40 (2005) 11
126 S. Ct. 40 (2005) 11
United States v. *Sidhu*, 130 F.3d 644 (5th Cir. 1997) 11

Statutes and regulations:

Antiterrorism and Effective Death Penalty Act of 1996, Pub. L. No. 104-132, § 440(d), 110 Stat. 1277 2
Illegal Immigration Reform and Immigrant Responsibility Act of 1996, Pub. L. No. 104-208, Div. C, 110 Stat. 3009-546:
§ 304(b), 110 Stat. 3009-597 2
§ 321(a)(7), 110 Stat. 3009-628 4
Immigration Act of 1990, Pub. L. No. 101-649, § 511, 104 Stat. 5052 2
Immigration and Nationality Act, 8 U.S.C. 1101 *et seq.*:
8 U.S.C. 1101(a)(13)(C)(v) 9
8 U.S.C. 1101(a)(43)(M)(i) 3, 4
8 U.S.C. 1101(a)(43)(U) 3
8 U.S.C. 1182(c) (1994) (§ 212(c)) ..... *passim*
8 U.S.C. 1227(a)(2)(A)(iii) 3

Statutes and regulations—Continued: Page

8 U.S.C. 1229b (§ 240A) 2
8 U.S.C. 1229b(a)(3) 2
8 C.F.R.:
Section 1003.44(a) 4
Section 1212.3(h) 4

In the Supreme Court of the United States

No. 06-140

SAMARJEET SIDHU, PETITIONER

v.

ALBERTO R. GONZALES, ATTORNEY GENERAL

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1-5) is not published in the *Federal Reporter*, but is *reprinted in* 179 Fed. Appx. 221. The opinion of the Board of Immigration Appeals (Pet. App. 6-8) and the decision of the immigration judge (Pet. App. 9-20) are unreported.

JURISDICTION

The court of appeals entered its judgment on April 27, 2006. The petition for a writ of certiorari was filed on July 26, 2006. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. Former Section 212(c) of the Immigration and Nationality Act (INA), 8 U.S.C. 1182(c) (1994) (repealed Supp. II 1996), authorized a permanent resident alien

with a lawful unrelinquished domicile of seven consecutive years to apply for discretionary relief from deportation. See *INS* v. *St. Cyr*, 533 U.S. 289, 295 (2001). In the Immigration Act of 1990, Congress amended Section 212(c) to preclude from eligibility for discretionary relief any alien previously convicted of an aggravated felony who had served a prison term of at least five years. Pub. L. No. 101-649, § 511, 104 Stat. 5052. In the Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA), Congress amended Section 212(c) to preclude from eligibility for discretionary relief any alien previously convicted of certain types of offenses, including an aggravated felony, without regard to the amount of time spent in prison. See Pub. L. No. 104-132, § 440(d), 110 Stat. 1277.

Later in 1996, in the Illegal Immigration Reform and Immigrant Responsibility Act of 1996 (IIRIRA), Congress repealed Section 212(c), see Pub. L. No. 104-208, Div. C, § 304(b), 110 Stat. 3009-597, and replaced it with Section 240A of the INA, 8 U.S.C. 1229b, which provides for a form of discretionary relief known as cancellation of removal. Like Section 212(c) as amended by AEDPA, Section 240A precludes from discretionary relief an alien who has been convicted of an aggravated felony. See 8 U.S.C. 1229b(a)(3). In *St. Cyr*, *supra*, this Court held, based on principles of non-retroactivity, that IIRIRA's repeal of Section 212(c) should not be construed to apply to an alien convicted of an aggravated felony through a plea agreement if, at the time of the plea agreement, the conviction would not have rendered the alien ineligible for relief under Section 212(c). 533 U.S. at 314-326.

2. Petitioner is a citizen of Canada. In 1984, he was admitted to the United States as a lawful permanent

resident. In 1996, a jury found petitioner guilty of conspiracy to commit mail fraud; aiding and abetting mail fraud; and making material false, fictitious, and fraudulent statements to federal investigators. Pet. App. 2-3, 21. He was sentenced to a term of imprisonment of 37 months. *Id.* at 30. In 1999, the government commenced removal proceedings against petitioner based on his conviction of an aggravated felony. *Id.* at 3; see 8 U.S.C. 1101(a)(43)(M)(i) (offense involving fraud or deceit with loss to the victim exceeding $10,000); 8 U.S.C. 1101(a)(43)(U) (conspiracy to commit aggravated felony); 8 U.S.C. 1227(a)(2)(A)(iii). In April 2001, the immigration judge (IJ) found petitioner removable as charged and ineligible for any relief from removal, and ordered petitioner removed to Canada. Pet. App. 28-40.

Petitioner appealed to the Board of Immigration Appeals (BIA). While the appeal was pending, this Court issued its decision in *St. Cyr*. Petitioner then filed a supplemental brief, in which he argued, based on *St. Cyr*, that he was eligible to seek discretionary relief from removal under former Section 212(c) because his aggravated felony conviction predated the repeal of Section 212(c). The BIA dismissed the appeal and remanded the case to the IJ for consideration of petitioner's application for discretionary relief under former Section 212(c). Pet. App. 21-27.

3. On remand, the IJ found that petitioner was eligible to seek discretionary relief under former Section 212(c), and, after a hearing, granted petitioner discretionary relief. Pet. App. 9-20.[1]

---

[1] The IJ concluded that, although petitioner's conviction postdated AEDPA, his offense did not qualify as an aggravated felony until IIRIRA later amended the definition of aggravated felony so as to reduce the minimum amount of loss for an offense involving fraud or

The government appealed the IJ's decision, and the BIA sustained the government's appeal. Pet. App. 6-8. The BIA, relying on the decisions of a number of courts of appeals, concluded that *St. Cyr* is inapplicable to an alien whose aggravated felony conviction was pursuant to a trial rather than a guilty plea. *Id.* at 7. The BIA further explained that, under proposed regulations implementing *St. Cyr*, the availability of relief under former Section 212(c) did not extend to an alien whose aggravated felony conviction was pursuant to a trial. *Id.* at 7-8; see 8 C.F.R. 1003.44(a), 1212.3(h). The BIA therefore ordered petitioner removed to Canada. Pet. App. 8.

4. The court of appeals affirmed in an unpublished, per curiam opinion. Pet. App. 1-5. The court, relying on its previous decision in *Hernandez-Castillo* v. *Moore*, 436 F.3d 516 (5th Cir. 2006), held that *St. Cyr* does not apply to an alien whose aggravated felony conviction was pursuant to a trial rather than a guilty plea. Pet. App. 5. Accordingly, the court concluded, petitioner is ineligible for discretionary relief under former Section 212(c). *Ibid.*

ARGUMENT

Petitioner contends (Pet. 13-22) that the holding of *St. Cyr*, which involved aliens convicted of an aggravated felony through a plea agreement, should be extended to aliens convicted after trial. He also argues (Pet. 15-16) that the court of appeals' decision conflicts with the Third Circuit's decision in *Ponnapula* v. *Ashcroft*, 373 F.3d 480 (2004). Those contentions lack merit and do not warrant review. This Court has denied other petitions raising the same claim raised by petitioner, see

---

deceit from $200,000 to $10,000. See Pet. App. 11, 13; 8 U.S.C. 1101(a)(43)(M)(i); IIRIRA § 321(a)(7), 110 Stat. 3009-628.

Thom v. *Gonzales*, 126 S. Ct. 40 (2005); *Stephens* v. *Ashcroft*, 543 U.S. 1124 (2005); *Reyes* v. *McElroy*, 543 U.S. 1057 (2005), and there is no reason for a different result here.

1. In *St. Cyr*, this Court addressed the situation of aliens who pleaded guilty after Section 212(c) was amended in 1990 to render ineligible for relief any alien convicted of an aggravated felony who had served a prison term of at least five years. A plea agreement providing for a sentence of less than five years thus would have assured the alien's eligibility for relief under then-current law. See *INS* v. *St. Cyr*, 533 U.S. 289, 293, 321-324 (2001). This Court placed considerable emphasis on the fact that "[p]lea agreements involve a *quid pro quo*," whereby, "[i]n exchange for some perceived benefit, defendants waive several of their constitutional rights (including the right to a trial) and grant the government numerous tangible benefits." *Id.* at 321-322 (internal quotation marks omitted). In light of "the frequency with which § 212(c) relief was granted in the years leading up to AEDPA and IIRIRA," the Court concluded that "preserving the possibility of such relief would have been one of the principal benefits sought by defendants deciding whether to accept a plea offer or instead to proceed to trial." *Id.* at 323. And because, in the Court's view, aliens in St. Cyr's position "almost certainly relied upon th[e] likelihood [of receiving § 212(c) relief] in deciding whether to forgo their right to a trial," the Court held that "the elimination of any possibility of § 212(c) relief by IIRIRA has an obvious and severe retroactive effect." *Id.* at 325.

St. Cyr therefore was grounded in the notion that, because aliens would have based their decision to plead guilty on the continued availability of discretionary re-

lief, the plea of guilty gave rise to a reasonable reliance interest and expectations in preserving eligibility for that relief. In short, as the Court recently observed in describing the reasoning of *St. Cyr*, the "possible discretionary relief" was "a focus of expectation and reliance" in the decision to plead guilty as part of a "*quid pro quo* agreement." *Fernandez-Vargas* v. *Gonzales*, 126 S. Ct. 2422, 2432 & n.10 (2006) (citing *St. Cyr*, 533 U.S. at 323).

In *Hernandez-Castillo* v. *Moore*, 436 F.3d 516 (2006), petition for cert. pending, No. 05-1251 (filed Mar. 28, 2006), on which the court of appeals relied below, see Pet. App. 5, the Fifth Circuit correctly concluded that "aliens who chose to go to trial are in a different position with respect to IIRIRA than aliens like St. Cyr who chose to plead guilty." 436 F.3d at 520 (quoting *Rankine* v. *Reno*, 319 F.3d 93, 99 (2d Cir.), cert. denied, 540 U.S. 910 (2003)). As the court explained, unlike an alien who pleaded guilty, an alien who went to trial did not "detrimentally change[] his position in reliance on continued eligibility for § 212(c) relief." *Ibid.* (quoting *Rankine*, 319 F.3d at 99). An alien who pleaded guilty "would have participated in the *quid pro quo* relationship in which a greater expectation of relief is provided in exchange for forgoing a trial," thus implicating "the reliance interest emphasized by [this] Court in *St. Cyr*." *Ibid.* (quoting *Rankine*, 319 F.3d at 99). Aliens who elected to go to trial, by contrast, "made no decision to abandon any rights and admit guilt—thereby immediately rendering themselves deportable—in reliance on the availability of the relief offered prior to IIRIRA." *Id.* at 520 n.3 (quoting *Rankine*, 319 F.3d at 99). Their decision to go to trial, "standing alone, had no impact on their immigration status," and "[u]nless and until they

were convicted of their underlying crimes," they "could not be deported." *Ibid.* (quoting *Rankine*, 319 F.3d at 99). Such aliens, unlike aliens who pleaded guilty, therefore could make no "claim that they relied on the availability of § 212(c) relief in making the decision to go to trial." *Ibid.* (quoting *Rankine*, 319 F.3d at 99).

2. In addition to the Fifth Circuit below, six other courts of appeals have likewise declined to extend the holding of *St. Cyr* to aliens convicted after trial. See *Dias* v. *INS*, 311 F.3d 456 (1st Cir. 2002) (per curiam), cert. denied, 539 U.S. 926 (2003); *Rankine* v. *Reno*, 319 F.3d 93 (2d Cir.), cert. denied, 540 U.S. 910 (2003); *Chambers* v. *Reno*, 307 F.3d 284 (4th Cir. 2002); *Montenegro* v. *Ashcroft*, 355 F.3d 1035, 1036-1037 (7th Cir. 2004) (per curiam); *Armendariz-Montoya* v. *Sonchik*, 291 F.3d 1116, 1121-1122 (9th Cir. 2002), cert. denied, 539 U.S. 902 (2003); *Brooks* v. *Ashcroft*, 283 F.3d 1268, 1273-1274 (11th Cir. 2002).

a. Contrary to petitioner's argument (Pet. 15-16), those decisions do not conflict with the Third Circuit's decision in *Ponnapula*. While *Ponnapula* did address the question whether the 1996 amendments to the INA apply to aliens found guilty at trial before 1996, it did not hold that the amendments are inapplicable to *any* alien found guilty at trial. The Third Circuit framed the question to be decided in *Ponnapula* as "what aliens—if any—who went to trial and were convicted did so in reasonable reliance on the availability of § 212(c) relief." 373 F.3d at 494. The court observed that, "[g]enerally speaking, reliance interests (in the legal sense) arise because some choice is made evincing reliance." *Ibid.* The court thus divided the category of "aliens who went to trial and were convicted prior to the effective date of IIRIRA's repeal of former § 212(c)" into (i) "aliens who

went to trial because they declined a plea agreement that was offered to them," and (ii) "aliens who went to trial because they were not offered a plea agreement." *Ibid.* Because aliens in the latter category "had no opportunity to alter their course in the criminal justice system in reliance on the availability of § 212(c) relief," the court "highly doubt[ed]" that aliens who were not offered a plea agreement "have a reliance interest that renders IIRIRA's repeal of former § 212(c) impermissibly retroactive as to them." *Ibid.* The Third Circuit ultimately held that "aliens * * * who affirmatively turned down a plea agreement had a reliance interest in the potential availability of § 212(c) relief." *Ibid.*

Petitioner was convicted of an aggravated felony at trial, but he does not contend that he declined a plea agreement before proceeding to trial. He therefore would not be able to prevail even under the Third Circuit's decision in *Ponnapula*. With respect to aliens who were convicted at trial before AEDPA and IIRIRA and who did not decline a plea agreement, there is no conflict between the decision below and *Ponnapula* on the question whether application of those laws would be retroactive.[2]

---

[2] Although petitioner observes (Pet. 12) that he argued below that "he could well have relied upon the existence of § 212(c) in electing *not* to enter into a plea bargain," petitioner has made no contention, either in the proceedings below or in the petition, that he was offered a plea agreement or that he declined to enter into a plea agreement. Rather, petitioner has hypothesized only that "a plea agreement could likely have been arranged." Pet. C.A. Br. 46. The alien in *Ponnapula*, by contrast, had been offered and had declined a plea agreement based on advice that, if he were convicted at trial, he likely would be sentenced to less than five years and thus would remain qualified for relief under former Section 212(c). See *Ponnapula*, 373 F.3d at 484. The *Pon-*

b. The court of appeals' decision also does not conflict with the Fourth Circuit's decision in *Olatunji* v. *Ashcroft*, 387 F.3d 383 (2004). See Pet. 17-18. That decision did not address in any form the question presented here. *Olatunji* involved a different provision of IIRIRA, codified at 8 U.S.C. 1101(a)(13)(C)(v), that provides that a lawful permanent resident who travels outside the United States will not be regarded as seeking admission upon his return unless he has been convicted of certain crimes. See *Olatunji*, 387 F.3d at 386. The question presented here was addressed by the Fourth Circuit in a different case, *Chambers* v. *Reno*, 307 F.3d 284 (2002), which held, consistent with the view of every other court of appeals to consider the question, that the amendments rendering aggravated felons ineligible for discretionary relief apply to an otherwise-eligible alien who was convicted after trial.

It is true, as petitioner observes (Pet. 18), that, in ruling for the alien in *Olatunji*, the Fourth Circuit reasoned that the fact that the provision of IIRIRA in question "attached new legal consequences to Olatunji's guilty plea is, alone, sufficient to sustain his claim," and that "no form of reliance is necessary." 387 F.3d at 389. But *Olatunji* did not purport to overrule *Chambers*. Indeed, *Olatunji* explicitly distinguished *Chambers* on the ground that the provision of IIRIRA at issue there (and here) "did not attach new consequences to [the alien's] 'relevant past conduct,' namely his decision to go to trial." *Id.* at 392 (quoting *Chambers*, 307 F.3d at 293). Even under the reasoning employed in *Olatunji*, therefore, the amendments to the INA limiting the availabil-

---

napula court accordingly limited its holding to aliens "who affirmatively turned down a plea agreement," *id.* at 494, and petitioner does not suggest that he fits in that category.

ity of relief from removal are applicable to aliens, like petitioner, who were convicted of an aggravated felony after trial.

c. Finally, the court of appeals' decision does not conflict with the Second Circuit's decision in *Restrepo* v. *McElroy*, 369 F.3d 627 (2004). See Pet. 17. The Second Circuit held in that case that the repeal of Section 212(c) relief does not apply to an alien who decided to forgo an opportunity to apply "affirmatively" for Section 212(c) relief—*i.e.*, after his criminal conviction but before being placed in deportation proceedings—in the hope that he could build a stronger case for relief. See *Restrepo*, 369 F.3d at 632-635. That decision does not assist petitioner because he has not suggested that he decided to forgo affirmatively applying for Section 212(c) relief before he was placed in removal proceedings. See *Thom* v. *Ashcroft*, 369 F.3d 158, 163 (2d Cir. 2004) (*Restrepo* does not apply to an alien who was convicted of an aggravated felony after a trial rather than through a guilty plea and who "does not claim any other basis for * * * a reliance or expectation"), cert. denied, 126 S. Ct. 40 (2005).

Moreover, the Second Circuit in *Restrepo* distinguished and reaffirmed its decision in *Rankine*, *supra*, which held that *St. Cyr* did not apply to an alien convicted of an aggravated felony after a trial rather than through a guilty plea because such an alien could make no comparable claim of reliance in the decision to go to trial. See *Restrepo*, 369 F.3d at 636-637. The court of appeals below adhered to its previous decision in *Hernandez-Castillo*, which in turn relied heavily on the Second Circuit's decision in *Rankine*. See *Hernandez-Castillo*, 436 F.3d at 520; pp. 6-7, *supra*. The Second

Circuit therefore would resolve petitioner's claim in the same manner as the court of appeals below.[3]

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

PAUL D. CLEMENT
Solicitor General
PETER D. KEISLER
Assistant Attorney General
DONALD E. KEENER
BARRY J. PETTINATO
Attorneys

SEPTEMBER 2006

---

[3] The Tenth Circuit's decision in *Hem* v. *Maurer*, 458 F.3d 1185 (2006), which was issued after the petition was filed in this case, does not assist petitioner. In that case, the court held, based on principles of non-retroactivity, that IIRIRA's repeal of Section 212(c) does not apply to an alien "who proceeds to trial but forgoes his right to appeal when § 212(c) relief was potentially available." *Id.* at 1187. The court reasoned that an alien might decide to forgo an appeal if a successful appeal could ultimately result in imposition of a sentence of more than five years, such that the alien would thereby be deprived of eligibility for relief under former Section 212(c). *Id.* at 1200-1201. Petitioner is not aided by the decision in *Hem* because he did not forgo an appeal, but instead appealed his conviction. See *United States* v. *Sidhu*, 130 F.3d 644 (5th Cir. 1997).